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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-194

BARBARA J. FUHRMAN, Administratrix of the Estate of ARTHUR J. FUHRMAN, Deceased, ELIZABETH HASKE, Administratrix of the Estate of STANLEY HASKE, Deceased, BILLY R. HOLLEY, MICHAEL IDALSKI, RAPHAEL PRZYBYLA, WALTER TULGETSKE and RONALD G. PIECHAN,

Petitioners,

v.

UNITED STATES STEEL CORPORATION

and

DEN NORSKE AMERIKALINJE A/S.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ELIZABETH HASKE, ADMINISTRATRIX OF THE ESTATE OF STANLEY HASKE, DECEASED, BILLY R. HOLLEY, MICHAEL IDALSKI, RAPHAEL PRZYBYLA, WALTER TULGETSKE AND RONALD G. PIECHAN,

Petitioners,

v.

UNITED STATES STEEL CORPORATION

AND

DEN NORSKE AMERIKALINJE A/S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Barbara J. Fuhrman, Administratrix of the Estate of Arthur J. Fuhrman, deceased, Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, Billy R. Holley, Michael Idalski, Raphael Przybyla, Walter Tulgetske and Ronald G. Piechan, respectfully pray that a Writ of Certiorari issue to review the final judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on May 1, 1973.

OPINIONS OF THE COURTS BELOW.

The original opinion of the District Court for the Northern District of Ohio, Eastern Division, on the question of punitive damages, filed on October 27, 1967, is reported at 276 F. Supp. 163 (Appendix B, p. A3). The opinion of the Court of Appeals for the Sixth Circuit, reversing the District Court, filed on March 7, 1969, is reported at 407 F. 2d 1143 (Appendix C, p. A78). Certiorari was denied by this Court, 398 U. S. 958. The opinion of the District Court for the Northern District of Ohio, Eastern Division, on the question of compensatory damages, filed July 8, 1969, is unreported (Appendix D, p. A89). The opinion of the Court of Appeals for the Sixth Circuit, filed December 23, 1970, is reported at 436 F. 2d 1256 (1970) (cert. den., 402 U. S. 987) (Appendix F, p. A94). The recomputation of awards by the District Court for the Northern District of Ohio, Eastern Division, filed November 24, 1971, is unreported (Appendix H, p. A141). The second recomputation of awards to correct mathematical errors, filed December 22, 1971, is unreported (Appendix I, p. A177). The opinion of the Court of Appeals for the Sixth Circuit, filed May 1, 1973, is reported at — F. 2d — (Appendix K, p. A189).

JURISDICTION.

The judgments of the Court of Appeals were entered on May 1, 1973 (Appendix L, p. A228). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Did the Court below clearly violate the rule of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953 (that when a Court of Appeals reverses a decision it must remand for a new trial under the correct interpretation of the law) when it held inadmissible and threw out the testimony of plaintiffs' and defendants' psychiatrists and ignored the testimony of the orthopedist upon which the Trial Judge relied in finding loss of earning capacity, and entered a judgment which completely wiped out all loss of earning capacity in the five personal injury cases, without giving the plaintiffs a new trial and the opportunity to present new evidence under the proper rule of evidence?

2. Did the Court below err in determining loss of earning capacity in the death cases, in refusing to use the collective bargaining agreements instead of taking the average money earnings during the four-year period prior to death without the fringe benefits which the men actually earned under the collective bargaining agreements?

STATEMENT OF THE CASE.

On May 7, 1965, the United States Steel Corporation ship "Cedarville" came into collision in a fog with the Den Norske's "Topdalsfjord" causing a great gash in the "Cedarville's" non-watertight hold, and she immediately started to sink at the rate of three inches per minute.[1] The "Cedarville" lay there at anchor for 15 minutes while her captain was in telephone communication with the company officials ashore. The crew were standing by the lifeboats waiting for the order to abandon ship. During this period, another ship was standing by and twice offered to take the "Cedarville" crew aboard. These offers were refused, and, instead, the "Cedarville", which already had sunk 5 of her 10 feet freeboard, was turned in the fog in the general direction of the invisible shore, proceeding at the rate of 2-3 miles per hour, in her then distressed condition. The order to abandon ship never came, and while the men were still standing by the lifeboats—waiting for the order to abandon—the decks came awash and the ship suddenly convulsed and overturned, trapping the men in the engineroom and hurling the men on deck into the bitter cold waters of Lake Huron.

Of the group on whose behalf this petition is filed, Fuhrman and Haske were drowned, and Holley, Tulgetske, Idalski, Piechan and Przybyla suffered serious and agonizing personal injury.

After extensive pretrial discovery the defendants admitted liability for consequential damages, and the case went to trial on the punitive damage issue. The trial court found U. S. Steel liable for punitive damages in an exhaustive opinion, 276 F. Supp. 163 (1967). The Court of Appeals reversed on the ground that the trial court's finding was not sustained by the evidence. 407 F. 2d 1143 (1969).

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1. The facts are taken from the findings of the trial court.

The trial judge then appointed two commissioners, one a law school dean and the other a former judge, to take testimony and make findings on damages. The trial judge ruled also that each side would be limited to one medical man for each specialty. After extended hearings, awards were rendered and approved by the trial judge.

On appeal, the Court below reversed on the grounds, *inter alia*, that the testimony of plaintiffs' psychiatrist was inadmissible and that the verdicts were excessive. The case was remanded for recomputation without the plaintiffs' psychiatric testimony.

On remand, in accordance with the directions of the Court below, the trial judge denied the claimants a new trial, and refused to consider or take any new testimony, and recomputed the awards, making drastic deductions after eliminating certain elements of damage and sharply curtailing others, as instructed.

After appeal, the Court below again reversed and made its own computation and entered its own judgment. It eliminated all loss of earning capacity for the five personal injury claimants and limited these claimants to reduced figures for pain and suffering and loss of life's pleasures—for life.[2] In so doing, the Court completely excluded the testimony of the plaintiffs' and defendants' psychiatrists and completely ignored the testimony of the orthopedic specialist, upon which the trial court had relied in making findings of loss of earning capacity.[3]

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2. The Court below even reduced the figures for pain and suffering and loss of life's pleasures to present value. This is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Chicago & N. W. Ry. v. Candler*, 283 F. 881 (8th Cir. 1922), where the court held that allowances for pain and suffering and inconvenience were not subject to being discounted.

3. In the trial court, as in the Court of Appeals, defendants contended the psychiatrist's testimony was inadmissible because (the questions) should have been in a hypothetical form. The Court of Appeals below now takes the position that it meant to completely exclude the psychiatric testimony under all circumstances.

As to the death cases, the Court below disallowed the collective bargaining agreements and refused to consider the relevant evidence bearing on earning capacity and struck out major elements of damage. The collective bargaining agreement under which the men worked provided for major fringe benefits, as are specifically set forth in Exhibits 1, 2 and 3 hereto, providing for approximately 150% increase over the basic money wages, but these most substantial elements of damage were ignored by the Court below.[4]

The original awards, the recomputed awards and the lower court's awards are as follows:

	Original Award	*Award as Recomputed by Trial Court*	*Award of Court of Appeals Below*
Fuhrman	$338,095.00	$137,801.00	$139,276.00
Haske	308,702.00	182,129.00	191,055.00
Przybyla	196,288.00	69,327.00	28,706.00
Piechan	82,160.00	37,065.00	24,659.00
Holley	251,976.00	92,329.00	42,404.00
Idalski	89,420.00	32,670.60	25,095.00
Tulgetske	195,888.00	92,733.10	67,476.00

4. In addition to those exclusions, the Court below, when it rendered its award on May 1, 1973, further reduced the award by taking the present value from May 1969. Present value reductions have never been applied retroactively. Present value applies only to future payments.

The award below also conflicts with other circuits in that it allowed no interest from the date of the accident to the date of judgment, as the trial judge here did. *Van Nievelt v. Cargo & Tankship Management Corp.*, 421 F. 2d 1183 (2d Cir. 1970); *The Wright*, 109 F. 2d 699 (2d Cir. 1940); *U. S. v. North Carolina*, 136 U. S. 211, 34 L. ed. 336 (1890); *Moragne v. States Marine Lines*, 398 U. S. 375, 26 L. Ed. 2d 339 (1970); *The Manhattan*, 85 F. 2d 427 (3d Cir. 1936); *Medina v. Erickson*, 226 F. 2d 475 (9th Cir. 1955); *Moore-McCormack Lines, Inc. v. Amirault*, 202 F. 2d 893 (1st Cir. 1953).

The trial court allowed medical expense plus maintenance and cure based on the testimony of the medical experts, but the Court below wiped out these items also, in direct conflict with this Court's decision in *Vaughan v. Atkinson*, 369 U. S. 527, 8 L. Ed. 2d 88 (1962).

ONS RELIED ON FOR ALLOWANCE OF WRIT.

Court Below Clearly Erred in Failing to Send the se Back for Retrial and in Entering Judgment Elim-ting the Element of Loss of Earning Capacity in the ve Personal Injury Cases, in Clear Violation of the le in Byrd v. Blue Ridge Rural Electric Cooperative, ., 356 U. S. 525, 2 L. Ed. 2d 953 (1958).

the first appeal, the Court below declared the testi-f plaintiffs' psychiatrist to be inadmissible and sent se back for recomputation without that testimony. al court then recomputed the cases on the basis of stimony of the *defendants'* psychiatrist and the edic specialist and found the five personal injury nts to be permanently disabled in substantial degree, de awards in greatly lessened sums for loss of earn-acity, pain and suffering and loss of life's pleasures.[5] he second appeal, the Court below ruled out the testi-f the *defendants'* psychiatrist although there was no on to it from any party, and completely ignored the ny of the orthopedist upon which the trial court n its recomputation. The record is replete with testi-f the orthopedist showing substantial permanent dis-in support of the trial court's findings.[6] The Court simply ignored all this and held that there was no earning capacity.

At no time had the defendants contended that a non-treating rist could not testify. On the contrary, it was their conten-: he could not relate the history obtained from the claimant n a hypothetical question based on the evidence.

Holley—The record of the orthopedist's testimony upon which court relied shows the most substantial permanent disability ack, et al., attributable to the accident. Record 1118, 1119, 22, 1123, 1124, 1126, 1127, 1128, 1129, 1130, 1131, 1132.

Sybyla—The testimony shows that he suffered permanent isabling back injuries, et al., according to the orthopedic

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953 (1958), plaintiff was injured while employed by a construction company. Defendant alleged the defense of "statutory employer." The trial court struck the defense, and the jury returned a verdict for the plaintiff. The Court of Appeals reversed, holding that the "statutory employer" defense should have been considered, and entered judgment for the defendant. On certiorari, this Court agreed with the ruling on the law, but reversed the judgment on the ground that a new trial should have been ordered to permit the plaintiff to offer proof upon the Court of Appeals' construction of the statute.

So, too, in the instant case, the trial court held the testimony of plaintiffs' psychiatrist to be admissible. The Court of Appeals below reversed and excluded that testimony.[7] Under the *Byrd* ruling, the case should then have

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6. (Cont'd.)
specialist, attributable to the accident. Record 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1334.

Piechan—The orthopedic testimony shows substantial permanent and disabling injury to knees, right hand, et al., attributable to accident. Record 1210, 1211, 1212, 1213, 1214, 1215, 1216.

Idalski—The orthopedic testimony shows permanent, substantial and disabling injury to the left shoulder and knee joints, et al., attributable to the accident. Record 1474, 1475, 1476, 1479, 1480, 1481, 1482, 1483.

Tulgetske—The orthopedic testimony shows permanent and disabling substantial injury to the back, tear of the right biceps muscle, et al., attributable to the accident. Record 1589, 1590, 1592, 1593, 1594, 1595, 1596, 1597.

It was this testimony which the trial court accepted upon remand and upon which it made findings of permanent disability with resulting loss of earning capacity.

7. The same Sixth Circuit Court of Appeals held in *Teti v. Firestone Tire & Rubber Co.*, 392 F. 2d 294 (1968): ". . . However this rule does not prevent a doctor from testifying to objective symptoms and conditions, nor from expressing an opinion based upon subjective statements of the patient if the record contains evidence which is substantially the same as that related to the doctor. . . ." (299). The sworn testimony in this case contains virtually all the history related to the psychiatrist.

been remanded for a new trial giving plaintiffs an opportunity to present evidence on the issues under the correct rules of evidence. Under the mandate from the Court of Appeals below, the trial court refused to conduct a new trial or to receive any new evidence and recomputed the damages without the testimony of plaintiffs' psychiatrist, making drastic reductions in the awards. After the appeal from these awards, the Court below then struck out the testimony of the *defendants'* psychiatrist and ignored the testimony of the orthopedic specialist and, itself, entered a judgment for permanent pain and suffering and loss of life's pleasures, but excluded completely the most substantial element—loss of earning capacity.

This holding is not only in utter violation of the *Byrd* case, but it is in conflict also with the decisions from other circuits on the general rule of admissibility of the medical evidence.

First of all, it conflicts with the Sixth Circuit's own holding in *Teti v. Firestone Tire & Rubber Co.*, 392 F. 2d 294 (1968), where the court held that even if the history obtained from the plaintiff was not itself admissible, it became admissible if the plaintiff already had testified to substantially the same facts, as in this case.

In *Kaufman v. Kaufman*, 164 F. 2d 519 (1947), Judge Maris, speaking for the District of Columbia Circuit, held the history, while subjective, is most relevant and admissible especially where a psychiatrist is concerned, that "In diagnosing such a subjective condition, the physician must necessarily rely largely upon the history and symptoms described to him by the patient."

Judge, now Mr. Justice, Marshall, speaking for the Second Circuit, in *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F. 2d 34 (1965), held that a non-treating physician could testify as to the history obtained from the

patient, not to establish the truth of the statements, but rather to show the basis for the doctor's diagnosis. The same rule has been followed by the District of Columbia Circuit also, in *City Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (1962); by the Seventh Circuit in *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (1963); by the Third Circuit in *Fuhrman v. Reading Co.*, 439 F. 2d 10 (1971), an action under the Federal Employers' Liability Act, which is applicable in the instant case. See also Wigmore on Evidence, Vol. II, Section 655, p. 760 (3d Ed. 1940) and McCormick on Evidence, which holds that the history from the patient is *necessary* in order that the fact finder may assess his opinion. McCormick Handbook of the Law of Evidence, Section 267.

The plain fact is that when the Court below threw out the psychiatrist's testimony, the plaintiffs became entitled to a new trial to prove the psychiatric condition by any proper means under the law. Instead, the Court below violated the law and deprived these plaintiffs of their legal rights. By excluding the testimony of *all* the medical experts, the Court below incredibly eliminated the element of loss of earning capacity.[8]

The testimony as originally accepted into evidence was a correct action by the trial court on the basis of the Sixth Circuit's own opinion in the *Teti* case and the other cases cited herein. This Court should grant certiorari, and, either reinstate the trial court's original awards made in 1969, or take such action as may be fair and just in the circumstances.

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8. Note that the Court below accepted the finding that the awards for pain and suffering and loss of life's pleasures were for *life*. This means that the injuries must also have been for life. It is therefore incomprehensible that the Court should throw out loss of earning capacity.

II. The Court Below Committed Prejudicial Error in Determining Loss of Future Earning Capacity in the Death Cases, by Failing to Consider the Collective Bargaining Agreements and the Very Substantial Fringe Benefits.

In determining the loss of future earning capacity, the Court below completely ignored the collective bargaining agreements under which the men worked, but instead, took the average earnings for the four years prior to the collision. The true rule requires a distinction between "actual earnings" at the time of death, and the "earning capacity", as the Second Circuit stated in *O'Connor v. United States*, 269 F. 2d 578 (1959), and it is the "earning capacity" which governs. As stated in McCormick, Law of Damages, Section 86, at p. 300, "Since the effort is to predict future earning power, the latest data should be used, and therefore it is proper to show that changes have occurred in the prevailing rate of wages in plaintiff's occupation since the injury."

In *Thompson v. Trent Maritime Co.*, 353 F. 2d 632 (1965), the Third Circuit held that, in determining the claimant's earning capacity, the "hourly rates" should be used. In *Sylvestri v. Warner & Swasey Co.*, 398 F. 2d 598 (1968), the Second Circuit held that the collective bargaining agreement was "a direct indicator of Sylvestri's potential loss of future earnings, even though he continued to receive a fixed salary from his own company." The cases uniformly hold that even though the claimant receives as much or more after the accident as before, this is not the test in determining loss of earning capacity. *Taylor v. Monongahela Ry.*, 256 F. 2d 751 (3d Cir. 1958); *Faudree v. Iron City Sand & Gravel Co.*, 315 F. 2d 647 (3d Cir. 1963); *Rice v. Phila. Transp. Co.*, 394 Pa. 454 (1959); *Wiles v. N. Y., Chicago & St. Louis R. R.*, 283 F. 2d 328 (3d Cir. 1960); *Lawrence v. Norfolk Dredging Co.*, 319 F. 2d 805

(4th Cir. 1963); *Carter v. United States,* 49 F. 2d 221. In *Johns v. Baltimore & Ohio R. R.,* 239 F. 2d 385 (3d Cir. 1957), the court said it is not the earnings at time of death which govern, but rather the potential earnings are the dominating factor; in *United States v. Phillips,* 44 F. 2d 689, the court held that a man was clearly disabled even though he returned to work; in *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.,* 298 F. 2d 918, the court held that the seaman's wages included the value of his "found" on board the vessel, as well as his money earnings. In the case at bar, the Court below took only the "money" earnings—for the four-year period *prior* to death—in fixing *future* loss of earning capacity. It refused to make any allowance for "found", "holidays", "vacations", "bonus", "annual service award", "pension" and "welfare." All of these items more than doubled the basic money wage adopted by the Court below.

For many years, all the claimants worked under collective bargaining agreements which contained fringe benefits actually received by the decedents and survivor claimants.[9] Set forth in Exhibit 1, attached hereto, is an anlysis of the collective bargaining agreements. These calculations show what the men actually received in addition to their money wages. Thus, for Fuhrman, the basic monthly wage was $639.25. For the total wage and fringe benefits, he received $1,380.19 per month. Haske received a basic monthly wage of $666.99 and total monthly earnings with

9. The Court below stated that a review of the collective bargaining agreements showed an annual increase in the past years of 1½%. This was erroneous. The agreements in the record cover only the last term of employment, and, no such study could have been made from the agreements in the record. The only testimony on this point comes from the witness Gallagher, a union representative, who testified that his examination of the agreements for the ten-year period prior to the collision showed that the wages increased at the rate of 4.5 to 5% annually (Record 1696). This testimony was uncontradicted.

fringes of $1,462.88. It is thus obvious that the Court below clearly erred, even in taking the past wages as a guide in leaving out the fringe benefits, the value of which exceeded the lower court's valuation by almost 150%. This error alone of the Court below makes its awards in the death cases less than one-half what they should have been.

In addition, the Court below also overlooked the future annual increases. It took the figure of 2% growth and simply added 2% onto the total loss of earnings as calculated. This was substantial error also because the growth figure was *annual* increase, and, therefore, should have been compounded annually. This would also have increased the total figure very substantially. However, the increase was not 2% as taken by the Court below but 5%, as testified by the union representative, whose testimony was indeed conservative, since the defendant U. S. Steel did not even challenge it.

CONCLUSION.

The Court below committed many errors in absolute conflict with the decisions from other circuits. We have, however, selected only two of these errors for this petition; one affects the five surviving claimants, and the other affects the two death cases, but even much more important than these cases is the fact that the principles will affect virtually every maritime personal injury case. If the decision of the Court below is permitted to stand, thousands upon thousands of maritime cases will fail or be sharply curtailed, because of the lack of medical testimony; and death cases will now be awarded only a fraction of what the widows and children are entitled to receive.

This Court should grant certiorari to the end that the decision of the Court below in the instant case be reversed,

and correct rules of law for the conduct of maritime cases be pronounced.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
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BRIEF EXHIBIT 1.

ANALYSIS OF AGREEMENT BETWEEN UNITED STATES STEEL CORPORATION AND INTERNATIONAL UNION, DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND LOCAL UNION NO. 14913 (AS AMENDED JANUARY 1, 1968)

	Stanley Haske, Dec'd, Wheelsman	Arthur J. Fuhrman, Dec'd, A/B Watchman	Stanley P. Mulka, Deckhand	Raphael Przybyla, Oiler	Eugene F. Jones, Dec'd, Stokerman	Jerome Kierzek, 2nd Cook	Billy R. Holley, Stokerman
Basic Hourly Rate	2.405	2.305	1.975	2.405	2.365	2.305	2.365
Basic Monthly Wage (1)	666.99	639.25	547.73	666.99	655.89	639.25	655.89
Overtime (2)	144.30	138.30	109.50	144.30	141.90	138.30	141.90
Holidays (3)	14.43	13.83	11.85	14.43	14.19	13.83	14.19
Vacations (4)	44.89	43.03	36.87	44.89	44.15	43.03	44.15
Bonus (5)	66.69	63.92	54.77	66.69	65.58	63.92	65.58
Subsistence (6)	360.00	360.00	360.00	360.00	360.00	360.00	360.00
Anual Service Award (7)	16.66	16.66	16.66	16.66	16.66	16.66	16.66
Pension (8)	82.50	45.25	35.17	45.92	338.58	37.00	66.75
Welfare (9)	66.42	59.95	31.98	65.06	101.26	59.38	65.80
Total Monthly Earnings	1,462.88	1,380.19	1,204.53	1,424.94	1,738.21	1,371.37	1,430.93

EXPLANATORY REMARKS.

(1) Computed on wage rate effective January 1, 1968. See Agreement between U. S. Steel and Intl. Union District 50 (Deft. Ex. 11), Appendix A, page 40. The rate was computed in accordance with Art. VIII, Sec. 3 and Art. IX, Sec. 2, on the basis of a 56-hour work week with 40 hours paid for at straight hourly rate, and 16 hours at 1½ times hourly rate. The basic monthly wage is therefore computed at 64 times hourly rate times 52 weeks, divided by 12, to secure monthly earnings.

(2) 40 hours based on testimony of Michael Gallagher.

(3) The monthly value of holiday pay has been based on the allowance of 9 holidays per year times 8 hours per day, or 72 hours per year, which has been allocated on the basis of 6 hours per month times the base hourly rate. See Deft. Ex. 11, Art. X, page 18.

(4) Vacation pay has been computed on the basis of an entitlement to 4 weeks' vacation. See Deft. Ex. 11, Art. XI, Sec. 3. The computation is therefore 4 x 56 x regular hourly rate divided by 12.

(5) Bonus has been computed on the basis of 1/10 the basic monthly wage. See Deft. Ex. 11, Art. VII, Sec. 5(a), page 12.

(6) Subsistence has been computed on the basis of $12.00 per day times 30 days per month based on testimony of Michael Gallagher.

(7) Annual service award has been computed on the basis of $200.00 per year divided by 12 to arrive at a figure for each month. See Deft. Ex. 11, Art. VIII, Sec. 10, page 13.

(8) Pension Benefits. The Agreement, Deft. Ex. 11, at page 41, provides that the same pension benefits will be available as are available for the majority of unlicensed seamen employed on Great Lakes vessels of United States Steel Corporation. The testimony of Gallagher shows that the majority of unlicensed seamen in this Fleet are represented by United Steelworkers of America. The pension agreement applicable is, therefore, the agreement between United States Steel Corporation and United Steelworkers of America. This agreement is Clmts. Ex. 7 in the record. The cost of obtaining these benefits has been secured for counsel by S. Green and Co., Inc. (See, *infra*, Clmts. Ex. 8.)

(9) Welfare Benefits. In accordance with the provisions of the District 50 Agreement (page 42), the insurance benefits available to the majority of unlicensed seamen employed on Great Lakes vessels of United States Steel Corporation are available for these employees. The program of insurance benefits covering these seamen is Deft. Exhibit 24 in the record. S Green and Co., Inc. was requested to ascertain the cost of securing such benefits. These costs are set forth in Clmts. Ex. 8, *infra*. The monthly cost has been determined by adding for each man the cost of life insurance, sickness and accident insurance, and hospital and physicians' services. These are quoted on an annual basis in the schedule; this was then divided by 12 to secure the monthly value.

(Letterhead of)

S. GREEN & COMPANY, INC.

——INSURANCE——

Lafayette Building
Fifth and Chestnut Streets
Philadelphia, Pennsylvania 19106
(215) WAlnut 5-3700

(KIERZEK—CLAIMANT'S EXHIBIT 8)

July 31, 1968

Abraham E. Freedman, Esquire
Messrs. Freedman, Borowsky & Lorry
Eighth Floor, Lafayette Building
Philadelphia, Pennsylvania 19106

Re: S/S "Cedarville"

Dear Mr. Freedman:

Attached is a schedule of estimated annual costs of securing Pension and Welfare Benefits for certain plaintiffs in the above-named matter substantially equal to the benefits to which they were entitled under the applicable collective bargaining agreements.

I have calculated each man's Regular Pension at Normal Retirement. The premiums are taken from rates published by the Hartford Life Insurance Company for their Annual Premium Retirement Annuity at Age 65.

For the Life Insurance I have used a combination of Term to Age 65 and Life Paid-Up at Age 65 to provide the benefits before and after retirement. The premiums are taken from rates of the Hartford Life Insurance Company.

In the case of Jones it was necessary to interpolate for the pension and life insurance benefits since the tables used do not show rates beyond Age 55.

The premiums for the Sickness & Accident Insurance are taken from rates of the Paul Revere Life Insurance Company for Class B applicants for their Concord Policy. The benefit period is 52 weeks as provided by the United States Steel Program.

The rates for Hospital & Physicians' Services were quoted to me by Blue Cross/Blue Shield.

If I can be of any further assistance, please let me know.

Very sincerely yours,

A. MYERSON
Adolph Myerson

AM:ems
Enclosure

Brief Exhibit 1

	Fuhrman	Haske	Holley	Jones	Kierzek	Mulka	Przbyla
Year Born	1940	1929	1927	1907	1945	1945	1928
Age in 1965	25	36	38	58	20	20	37
Year Employed	1959	1946	1955	1938	1963	1965	1964
Pension							
Yr. of Normal Retirement	2005	1994	1992	1972	2010	2010	1993
Yrs. of Service to Normal Retirement	46	48	37	34	47	45	29
Reg. Monthly Pension	$ 285.00	$ 300.00	$ 217.00	$ 195.00	$ 292.00	$ 277.00	$ 158.00
Annual Premium	543.00	990.00	801.00	4,063.00	444.00	422.00	551.00
Life Insurance							
Before Retirement	$5,000.00	$5,500.00	$5,000.00	$5,000.00	$5,000.00	$5,000.00	$5,000.00
After Retirement	1,850.00	1,900.00	1,850.00	1,850.00	1,850.00	1,850.00	1,850.00
Annual Premium	62.40	96.33	97.32	300.40	55.45	55.45	93.46
Sickness & Accident Insurance							
Weekly Benefit	$ 76.00	$ 83.00	$ 76.00	$ 76.00	$ 76.00	$ 76.00	$ 76.00
Annual Premium	178.25	216.54	208.03	430.49	172.85	172.85	203.08
Hospital & Physicians' Services							
Annual Premium	$ 484.20	$ 484.20	$ 484.20	$ 484.20	$ 484.20	$ 155.40	$ 484.20

(Letterhead of)

BLUE CROSS OF WESTERN PENNSYLVANIA
ONE SMITHFIELD STREET, PITTSBURGH, PA. 15222

July 31, 1968

Mr. Adolph Myerson
506 Laffayette Building
Philadelphia, Pennsylvania 19106

Dear Mr. Myerson:

As quoted to you in our recent telephone conversation, the rates for the precise basic steel Blue Cross and Blue Shield benefits applicable for the unlicensed seaman are:

	Blue Cross	*Blue Shield*
Individual	$ 9.47	$ 3.50
Family	29.35	11.00

The above rates are quoted on a group of from 100 to 500 employees and assume an effective date of September 1, 1968.

If you need more information or if we can be of further service, please let us know.

Sincerely yours,

J. DONALD YOUNG
J. Donald Young
Staff Assistant

JDY/avs

BRIEF EXHIBIT 2.

ANALYSIS OF AGREEMENT BETWEEN UNITED STATES STEEL CORPORATION AND MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO.

	Walter Tulgetski 1st Asst. Engineer	Michael Idalski 2nd Asst. Engineer
Basic Monthly Wage (1)	1,288.00	1,030.00
Overtime (2)	237.60	189.90
Subsistence (3)	375.00	375.00
Bonus (4)	107.33	85.83
Holidays (5)	39.80	33.77
Vacations (6)	98.53	78.79
Pension (7)	66.60	66.60
Welfare (8)	56.64	56.64
Total Monthly Earnings	2,269.50	1,916.53

EXPLANATORY REMARKS.

(1) See Art. VII, Sec. 1, page 14. Agreement with District 2, M. E. B. A.*

(2) See Art. VII, Sec. 9, page 22, et seq. Based on an assumption of 30 hours per month average overtime, at 1½ times regular hourly rate, equals 45 hours times ⅛th daily rate.

(3) See Art. VII, Sec. 4, page 15 ($12.50 × 30).

(4) See Art. VII, Sec. 5, page 15 (10% of 10 times the monthly base wage, divided by 12).

(5) See Art. IX, page 27 (11 holidays per year equals 88 hours per year, or 7.33 hours per month times ⅛th daily rate).

(6) See Art. X (Assuming entitlement to 4 weeks per year—28 times daily rate, divided by 12).

(7) See Art. XVIII, page 50 (Assuming $2.00 per day contribution, or $60.00 per month times 111%) See Addendum, page 56.

(8) See Art. XIX, page 52 (Assuming 23.6¢ per hour contribution times 8 hours per day times 30 days per month.

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* Kierzek—Defense Exhibit 12. All references on this page are to this Agreement.

BRIEF EXHIBIT 3.

ANALYSIS OF AGREEMENT BETWEEN UNITED STATES STEEL CORPORATION AND ASSOCIATED MARITIME OFFICERS, DIVISION OF DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION (AS AMENDED JUNE 30, 1966)

	Ronald G. Piechan, Chief Conveyorman (Now entitled Conveyor Engineer)
Base Hourly Rate (1)	3.518
Basic Monthly Wage (2)	562.88
Average Overtime (3)	.....
Holidays (4)	21.10
Vacations (5)	65.66
Subsistence (6)	375.00
Pension (7)	66.60
Welfare (8)	30.00
Total Monthly Earnings	1,121.24

EXPLANATORY REMARKS.

(1) See Agreement with Associated Maritime Officers, Art. IX, Sec. 1, page 13, as amended by page 42. $2.963 plus .363 plus .192 equals $3.518.*

(2) Based on 40 hour week times 4.

(3) See Art. X, Sec. 6, page 17. We are informed that overtime is insignificant.

(4) See Art. XI, Sec. 1, page 19. 9 Holidays times 8 equals 72 hours divided by 12, or 6 hours per month.

(5) See Art. XII, page 20—Assuming 4 weeks entitlement; 4 × 56 hours per week times hourly rate, divided by 12.

(6) Based on $12.50 per day times 30 days per month.

(7) See page 37. Based on MEBA contract, Art. XVIII, page 50.

(8) See Art. XXI. I have assumed 12½¢ per hour, or $1.00 per 8-hour day. See page 38 of contract.

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* Kierzek—Defense Exhibit 9. All references on this page are to this Agreement.

FILE COPY

Supreme Court, U. S.
FILED
JUL 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1941

BARBARA J. FUHRMAN, Administratrix of the Estate of ARTHUR J. FUHRMAN, Deceased, ELIZABETH HASKE, Administratrix of the Estate of STANLEY HASKE, Deceased, BILLY R. HOLLEY, MICHAEL IDALSKI, RAPHAEL PRZYBYLA, WALTER TULGETSKE and RONALD G. PIECHAN,

Petitioners,

v.

UNITED STATES STEEL CORPORATION

and

DEN NORSKE AMERIKALINJE A/S.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
J. HAROLD TRAVERSE,
FREEDMAN, BOROWSKY AND LORRY,
Lafayette Building, 8th Floor,
Philadelphia, Pennsylvania. 19106,
Counsel for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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APPENDIX A.

Merchant Marine (Jones) Act, 46 USCA 688.

§ 688. Recovery for Injury to or Death of Seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located (41 Stat. 1007).

Federal Employers' Liability Act, 45 USCA 51.

§ 51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence; Definition of Employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * * * Apr. 22, 1098, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Federal Rules of Civil Procedure.

RULE 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

APPENDIX B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Admiralty No. A 65-19

In the Matter of:

The Petition of Den Norske Amerikalinje A/S, Owner of the M/S Topdalsfjord, for Exoneration From or Limitation of Liability.

In Admiralty No. C 66-655

In the Matter of:

The Petition of Hamburg-Amerikalinie as Owner of the Motorship Weissenburg.

In Admiralty No. A 65-6

In the Matter of:

The Petition of United States Steel Corp., as Owner of the Steamship Cedarville.

Connell, *J. C.:*

On May 7, 1965 a collision took place in the Straits of Mackinac between the Norwegian Topdalsfjord and the American ore-carrying Steamship Cedarville of the Bradley Fleet of the United States Steel Corporation, as the result of which the Cedarville sank approximately 40 minutes thereafter.

On May 15, 1965 the United States Steel Corporation, as owner of the Cedarville, filed a Petition for exoneration from or limitation of liability against three claimants who were the Administratrices of the estates of three seamen who lost their lives in this collision, and against many of the ship's crew, who were potential claimants.

Such action was filed in the United States District Court for the Northern District of Ohio, Eastern Division.

A similar Petition was filed in the United States District Court for the Northern District of Illinois at Chicago by Den Norske, Amerikalinje A/S, Owner of the Topdalsfjord, and another similar Petition was filed by the Hamburg-Amerikalinie, as Owner of the Motor Vessel Weissenburg, a ship which had been in close proximity to the collision, and which had, in fact, picked up all of its survivors.

The United States District Court at Chicago transferred the Petition of the Owners of both such foreign vessels to the United States District Court at Cleveland, Ohio, and the docket of this court discloses some two years' of filings, rulings, proceedings, conferences and pre-trials by counsel with the Court, thereafter.

The Coast Guard conducted a lengthy investigation herein, and in addition thereto, all counsel took depositions of all witnesses herein concerned. This Court did not directly hear any witness, but all counsel had the privilege of reading to the Court whatever evidence it chose, from both the Coast Guard investigation and the depositions taken in these matters; this reading consumed approximately five weeks. Many witnesses testified in both deposition and Coast Guard proceedings. Some testified several times in both such proceedings.

The question here presented to this Court by the reading of such testimony from these two sources is limited to

the question whether punitive damages may be or ought to be assessed in this case.

This was so because at the last in a series or pretrial conferences Counsel for the three petitioning shipowners and the claimants entered into a stipulation whereby judgment was entered against U. S. Steel and Den Norske on the counts of exoneration and limitation and Hamburg-Amerikalinie was relieved of all responsibility subject only to a special agreement between the three petitioning shipowners. The stipulation further provides that the count for punitive damages proceed against U. S. Steel only. The counsel for both foreign ships worked out an arrangement with the United States Steel Corporation whereby they retired from the case, which was then to be defended by United States Steel Corporation alone, and the Court then undertook to decide the question first as to whether punitive damages were herein susceptible of application, the evidence elicited being limited only to what witnesses had theretofore testified in the Coast Guard Hearings and on the depositions previously taken. It was further agreed that after the Court so ruled, a Commissioner would then be appointed to determine what compensatory damages should lie.

We then turn to the question whether, as a matter of law, punitive damages may be assessed in a proceeding of this nature. By way of background, however, we offer first this brief summary of the salient facts which give rise to this issue. Since this remaining phase of the case is limited to the issue of punitive damages, we concentrate our discussion upon those facts which bear upon that issue.

The "Cedarville", built in 1927, was a "self-unloader", 604 feet long, with a 60 foot beam; it had 16 hatches with no water-tight bulkheads. Its equipment included a revolving conveyor belt 450 feet long and 4 feet wide contained within

a tunnel below the ship's holds along the center line of the vessel. At the bottom of each hold there was an opening through which the cargo passed down into the tunnel and onto the conveyor belt. Any water which might be taken into any one of the holds of the vessel through the shell necessarily passed down into the tunnel, and in the event of the breach of the shell of the vessel, the water, in passing through any compartment, would immediately find its way into the tunnel and thereupon fill all of the holds. The vessel had no water-tight bulkheads to contain the water in any compartment where the shell of the vessel might be opened up. It was admitted by the operating manager of the U. S. Steel fleet that in the event of a collision and the opening of the hull below the water line the vessel would "sink like a brick". U. S. Steel's fear of such a collision prompted it to provide a "collision mat" about 16 feet by 24 feet, which was intended to be lowered down over any opening in the ship's hull to impede the flow of water into the vessel. This was a completely inadequate precaution against the ever-present danger of a collision.[1]

The "Cedarville" departed from the Port of Calcite on May 7, 1965 with a cargo of 14,411 tons of limestone. The "Cedarville's" freeboard (the protrusion of the vessel above the surrounding water to its deck line) was 10

1. There is evidence that the plates in the hull in certain vital areas required replacement by the United States Coast Guard and by the underwriters after inspections; that these replacements had been deferred for a period of almost five years, and that such conditions may have weakened the ship's hull; that there was no plan or program to be followed in the event of a collision; that U. S. Steel failed to provide its Captain with requisite information concerning the buoyancy, stability and trim of the vessel in order to determine its maneuvering characteristics. These and other matters not referred to in our factual discussion shows actionable negligence on the part of U. S. Steel, with which the latter was in direct and complete privity. However, these matters will not be considered, and we confine our discussion to those actions showing wilful and wanton misconduct which bear on the issue of punitive damages.

feet and ¼ inch.[2] Fog shrouded the area at the time of departure, and the fog signal was placed on automatic and the vessel proceeded at "full speed".[3] This was in violation of Rule 15 of the Great Lakes Rules of the Road which limits vessels to "moderate speed" in fog. The official navigational charts of the United States Coast Guard show recommended courses through the various waters. The recommended course after leaving Calcite was 320 degrees. Captain Joppich ignored the recommended course and fixed the vessel's course at 317 degrees. He stated that the company Captains fixed their own courses; the Coast Guard course from Forty-Mile Point is 301 degrees, but Captain Joppich steered 305 degrees; at Cordwood Point Buoy the Coast Guard course is 270 degrees, but Captain Joppich steered 261 degrees; at Poe Reef the Coast Guard course is 281 degrees, but Captain Joppich steered 285 degrees; at Cheboygan Traffic Buoy, Captain Joppich steered the recommended course at 302 degrees, but for a very short distance, and he thereafter changed to 305 degrees and later on to 310 degrees. Had Captain Joppich followed the Coast Guard courses, he would have completely avoided the disastrous collision. Approaching from the opposite direction were the Weissenburg and about one mile in front the Topdalsfjord. All vessels were using radar in the fog, but the "Cedarville" was not plotting the oncoming vessels to determine their course and speed. As the "Cedarville" approached the Mackinac Straits, Captain Joppich reached an agreement with the Weissenburg for a port-to-port passing, but he was unable to make

2. Claimants contend that the vessel was overloaded by 6½ inches beyond the point permitted by the Coast Guard Regulations, but in view of the position which we take, we find it unnecessary to reach this point.

3. It was routine practice for all company vessels to proceed at full speed in fog.

contact with the Topdalsfjord, which was one mile closer to him. Captain Joppich then blew one blast for a port-to-port passing, but he got no reply and he was unable to make contact with the Topdalsfjord by radio phone. Under these circumstances, with the vessels being between four and eight miles part, Captain Joppich was required by Rule 26 of the Great Lakes Rules of the Road [4] to sound the danger signal which he failed to do because he did not consider himself to be in an emergency. In attempting to excuse his violation of the Rule, Captain Joppich further testified that he was following the "prudent" Rule No. 27.[5] Throughout his testimony, Captain Joppich defends by afterthought, but traps himself in contradictions. Thus, while seeking refuge in the "prudent" rule, he contradicted himself by first claiming that there was no emergency at the time he blew his first one-whistle blast for a port-to-port passing, and then claiming the protection of Rule 27 which applies only when the vessel is in immediate danger. He then resorted to another deception in claiming

---

4. "Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessel shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. (33 U. S. C. 291)". The requirement to blow the danger signal is of the greatest importance in these collision cases. *Petition of Oskar Tiedemann and Company*, 179 F. Supp. 221, affirmed 289 F. 2d 237 (1961).

5. "Rule 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (33 U. S. C. 292)."

that it was not stated how far the vessels were apart, so that it could not be said that Rule 26 was applicable. This was likewise untrue for the rule specifically holds that the danger signal must be sounded if one vessel fails to understand the course or intention of the other, whether from signals being given or not answered irrespective of distance separating them. The question of distance is critical only when the vessels shall have approached within a half-mile of each other; at this point if eithe vessel is in doubt of the other's intention, both vessels "shall reduce their speed to bare steerageway, and, if necessary, stop and reverse". His wilful and deliberate failure to blow the danger signal as required when his first signal was unanswered was a substantial factor leading to the collision. Captain Joppich's activities thereafter further reveal an incredible course of conduct ostending a complete indifference to law and to human safety. As the two vessels approached each other closer and closer, he blew the one-blast signal for a port-to-port passing on four successive occasions; the last one came when the "Cedarville" was literally in the maw of the collision itself. All during this time he drove the "Cedarville" at full speed and never once did he blow the danger signal, nor did he reduce speed to bare steerageway and reverse as required by Rule 26. Had he blown the danger signal even once, and had he reduced his speed to bare steerageway or reversed, he would have escaped the collision. If he had followed the Coast Guard course of 302 degrees, there would have been no danger of collision. The "Topdalsfjord" was far to his right, and when he changed to 305 degrees and subsequently even to 310 degrees, he could still have avoided the collision if he had known the course of the Topdalsfjord, which he could have ascertained simply by plotting the blips on the radar. Instead, he turned the "Cedarville" hard

right to 325 degrees, which exposed it broadside to and directly in the path of the Topsdalsfjord, with the catastrophic events to follow. The full speed in the fog,[6] the refusal to follow the Coast Guard courses, the refusal to blow a danger signal, the refusal to reduce speed to bare steerageway and to reverse when the Topdalsfjord failed to answer his one-blast signals constitute wilful and wanton misconduct directly related to the collision and the subsequent loss of life and personal injury.

The record also supports the conclusion that United States Steel vested sole and exclusive discretion in the Captains of the vessels, and that the foregoing departures from the Rules were routine practices ratified by the highest echelon of the U. S. Steel Corporation.

The wilful and wanton deviations from law and prudence on the part of the petitioner and its Captain which caused the collision are dimmed in importance by the outrageous misconduct following the collision in deliberately and improperly exposing the crew of the "Cedarville" to death and serious personal injury.

The collision occurred at 0945 and the ice-breaker prow of the Topdalsfjord tore open a great gash in the "Cedarville's" port side below the water line, which caused an immediate rush of water into her compartments via the

6. Captain Joppich testified that he had reduced his speed from Cheboygan Traffic Buoy at 0842 to the point of collision at 0945, but the court rejects this testimony in the face of the indisputable physical facts in the record. The Coast Guard Officers demonstrated that the distance between the Cheboygan Traffic Buoy, which he passed at 0843, and the point of collision, which he reached at 0945, was 12.75 miles. It was proven that he covered this distance in one hour and three minutes. This conclusively established that the vessel was travelling in excess of 12 miles per hour, which was the full speed of the "Cedarville". The Court in this connection also accepts the testimony of Gabrysiak, who testified that the vessel was proceeding at full speed until the hard right turn immediately preceding the collision. Captain Joppich's testimony must be rejected in the light of this evidence.

conveyor tunnel. Captain Joppich rang the general alarm immediately and directed Chief Officer Piechan to examine the damage to the vessel. He then telephoned station WLC (owned and operated by U. S. Steel Corporation), and reported the collision, which information was transmitted within one or two minutes from the time of the collision on their private line to Captain Parrilla, Manager of the Bradley Fleet, a division of U. S. Steel Corporation, who was then in conference with Admiral Khoury, a top-ranking officer in the corporation office in Pittsburgh, Pa. Captain Parrilla refused to make contact with Captain Joppich, so he stated, and said he intended to leave the handling of the situation solely to the discretion of Captain Joppich. This was the only way Captain Joppich could communicate with Captain Parrilla.

Immediately after the sounding of the general alarm, those men not on watch reported to their lifeboat stations and lowered the lifeboats part of the way down waiting for the order to abandon ship, but the order never came. He ordered the engineers to put the pumps into operation and pump water into certain of the tanks and to start the pump in the conveyor tunnel. The Weissenburg's Captain May telephoned Captain Joppich that he was standing by and offered to take the crew off the "Cedarville," but Captain Joppich refused the offer and asked that he get the name of the Norwegian ship which had struck him.

About ten minutes after the collision, Chief Officer Piechan, after having examined the damage, reported to Captain Joppich that water was flooding the vessel and that the hole was too large for the 18 by 24 foot collision canvas to fit over it.

At approximately 1002, about seven minutes after the report from the Chief Officer, the decision was made to beach the vessel. Captain Joppich testified that he alone made the decision, but by that time Captain Parrilla had

received another call which incorporated Chief Officer Piechan's report and he knew at that point that the vessel was "seriously holed", that "she was taking water", and he was also aware at that time of the decision to beach the "Cedarville". Notwithstanding this knowledge and his own admission that the "Cedarville" would "sink like a brick" if she was holed, Captain Parrilla refused to take any action to instruct Captain Joppich or to discuss the situation with him, or so he claimed, stating further that he had given Captain Joppich absolute control over the vessel, and under no circumstances would he interfere with Captain Joppich's discretion even if he were on the bridge of the vessel at the moment with Captain Joppich. Captain Parrilla's testimony in this regard is so shocking as to merit brief quotation as follows (Tr. 335):

> "Q. So that even if you knew that she was, in your opinion, going to go down, because of the fracture in the hull, and you knew that the Captain was going to beach her, and that she might go down, and *in your opinion would go down during the course of the run to the beach, you still wouldn't take any action but you would leave it to the Captain?*
>
> A. *Absolutely.* I think these decisions and these actions are his."

At the time of the decision to beach, the vessel had lost about four feet of her freeboard and was sinking at the rate of about three inches per minute. Notwithstanding this, Captain Joppich refused to give the order to abandon ship.

After the decision to beach the vessel was made, Captain Joppich ordered the anchor pulled up, but it was fouled on the bottom. The anchor was freed but not until the engines were put in reverse, whereupon he ordered the engineers to "give her all she had".

In the meantime, the Weissenburg was standing by all the while waiting to take the men off the "Cedarville". Captain May repeated his offer on two further occasions, stating that the Weissenburg was very close at hand with two of its lifeboats swung out ready to take the Cedarville's crew aboard, but Captain Joppich refused these offers and refused to give the order to abandon ship. As Captain Joppich proceeded to navigate the "Cedarville" around the Weissenburg, Captain May made one last plea for the removal of the Cedarville's crew in a most dramatic fashion, as follows:

> "A. (Continuing) Yes, because that was the moment where the Cedarville nearly crossed my bow, and I was about, let's say, two or three cable lengths of it, see, so the Cedarville must be somewhere over here in that moment.
>
> That was the moment, you see—it shows in my log book—when I stopped my ship not to collide with the Cedarville, and that was the moment when I asked him, I contacted the Cedarville again, 'Please, Captain, which side do you prefer that I come alongside to take off your crew,' and this was the moment, when he said, 'get out of my way, get out of my way, I try to beach her,' so I had to stop my ship. This is the time of 1002."

This Court regards the decision to beach the vessel without evacuating the men as an outrageous, indeed horrendous, act of misconduct on the part of Captain Joppich and United States Steel. Seventeen fateful, precious minutes had elapsed since the collision, giving the Captain the fullest opportunity to survey the damage; it was readily apparent that this ship would reach no beach. She was doomed at that point, and it was clear that she would take with her the crew unless he took immediate action to re-

move the men. Up to that moment he could have removed the entire crew with complete safety. The vessel had been dead in the water, anchored to the bottom; the Weissenburg was immediately at hand with its lifeboats out so that the men could have been removed with virtually no danger, either by descending into the lifeboats or by having the Weissenburg come alongside as Captain May offered. At that point Captain Joppich could see that the vessel had already sunk into the water about three or four feet, and that she was steadily sinking at the rate of about three inches per minute. Said Captain Joppich, "I took a gamble" in trying to beach the vessel. This was a wilful, wanton act of misconduct of the worst order which this Court finds to be indefensible. He could have chosen to jeopardize his own life, but he had no right to jeopardize the lives of others by failing to remove the crew before embarking on the run for the beach. Had he so desired, he could have done so simply by directing the engine to be set at full throttle while he handled the wheel on the bridge. Having made the decision to beach,[7] he turned the sinking vessel in the general direction of the shore, without knowing exactly where he was headed and how long it would take to reach the nearest shoreline.

As the vessel proceeded toward the beach, the men stood by waiting for the order to abandon ship with their

7. This Court is convinced that the decision to beach was not that of Captain Joppich alone. The evidence sufficiently establishes that the high principals in the company were fully advised of the developments as they unfolded, and such evidence justifies the inference that they might thus reduce the company's liability if they could demonstrate a lack of privity between Captain Joppich and the company officials, and therefore they remained silent. This conclusion is supported by the testimony of witness Brege, inter alia, whose recollection of what she heard over the air on her "ham" radio suddenly became very faulty after a visit by U. S. Steel officials, including Captain Parrilla, the very night before her deposition was taken, as is hereinafter related.

lifejackets on, but the order never came. Without such an order, none of the men were authorized to leave the vessel. The men in the engineroom stood by their posts and the men on duty on deck likewise remained at their posts. All the crew showed great courage, obedience to duty and dedication to the service in the highest traditions of the American Merchant Marine. All the crew performed their duties. This, however, their leadership failed to do, at great cost to the crew.

As the mortally wounded vessel labored through the water, sinking steadily at the rate of three inches per minute, her speed was cut down to two or three miles per hour. Captain Joppich was unmoved, however, although he could clearly see the vessel sinking steadily and the momentum of the ship so low as to make the chances of a successful beaching absolutely nil. Yet, he refused to give the order to abandon ship when the lifeboats could still have been placed in the water while she was barely moving and steadily sinking. He sent a man below to get him a lifejacket. Finally, when the decks were awash, he stepped out of the pilothouse, leaving the third mate and the wheelsman on duty inside, and the engineroom crew on duty pursuant to his orders down in the lowest levels of the engineroom. Even at this late moment lives might have been saved if he had uttered the two fateful words. It seemed as though the vessel was struggling valiantly to keep herself afloat and on an even keel until the last instant so that its loyal crew could be rescued, but Captain Joppich was coldly steadfast in his determination that the crew not abandon the ship.

The end came quickly as the decks came awash. The "Cedarville" convulsed and capsized throwing the men, a lifeboat and a raft into the water as she went down taking with her the remainder of the trapped crew. Some

of those thrown clear into the water were sucked down but were brought up again by the lifejackets. Captain Joppich, who had stepped out on the bridge from the pilothouse when he saw that the end was near, was thrown clear off the vessel from his high perch. The third mate, Cook, whom he left on duty in the pilothouse, was sucked under and he suffered the same agonizing fate as the others who were trapped in the vessel. Even greater loss of life was averted by the commendable action of the Captain of the Weissenburg. Recognizing that the "Cedarville" was in trouble, Captain May followed her with his lifeboats in a ready position for launching. He detected the sinking on his radar and he heard the cries of the men in the water. His forthright action in putting his lifeboats in the water and directing them to the area where the "Cedarville" went down unquestionably saved the lives of many of the survivors. He saved all who were saved.

Ten men perished in the water; four from the engineroom department, Chief Engineer Lamp, Third Assistant Engineer Radtke, Stokerman Jones and Oiler Wingo; five men in the Deck Department lost their lives, Third Mate Cook, Deck Watchman Fuhrman, Deck Watchman Jungman, Wheelsman Haske and Wheelsman Asam; one man in the Steward's Department, Bredow. The remaining members of the crew suffered the physical ordeal of exposure in icy water and the mental anguish of death staring them in the face. From this background, we address our attention to the principles of law upon which this cargo hinges.

Our threshold consideration is whether punitive damages may ever be assessed in a maritime proceeding. Preliminarily, however, we deem it appropriate to discuss the peculiar employment relationship between seaman and

their employers and between the crew of a vessel and its Master. As stated by the Supreme Court in *Southern Steamship Company v. N. L. R. B.*, 316 U. S. 31, 38 (1942):

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority."

In the maritime field, therefore, there must be abject obedience to orders from the moment the seaman enters service until his discharge. It is settled that this condition of the seaman's contract is a singular exception to the Thirteenth Amendment's prohibition against involuntary servitude. *Robertson v. Baldwin*, 165 U. S. 275, 288 (1897). As a consequence, the relationship between the owner of a vessel and its crew fashions a unique doctrine which places the employer *in loco parentis* to the seaman (*Robertson*, supra at 287) and makes the master the legal guardian of the seaman. The *Iroquis*, 194 U. S. 240, 247 (1904); *Murphy v. American Barge Line Company*, 169 F. 2d 61 (3rd Cir. 1948). Thus emanates the ancient notion that seamen are "emphatically the wards of the admiralty." *Harden v. Gordon*, 11 Fed. Cas. 480, 485 (D. C. Me. 1823) (Story, J.). These considerations necessarily reflect themselves in our decision today.

The cause of action for punitive damages has always been recognized as an actionable right in admiralty. *The Amiable Nancy*, 16 U. S. (3 Wheat.) 547 (1818). The

Supreme Court of the United States, in *Lake Shore and Michigan Southern Railway Co. v. Prentiss*, 147 U. S. 101 (1892), in referring to *The Amiable Nancy*, pointed out that the cause of action for punitive damages was co-extensive in admiralty and the common law:

> "The rule thus laid down is not peculiar to courts of admiralty; for as stated by the same eminent Judge two years later, those courts proceeded in cases of tort upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred or injuries or losses sustained by the misconduct of the other party."

In *Caldwell v. New Jersey Steamboat Company*, 47 N. Y. 282 (1972), the New York Court of Appeals authorized exemplary damages in a maritime tort case when a boiler on a steamboat exploded, severely injuring a passenger; the trial court had instructed the jury that if they found the injury resulted from culpable negligence (defining cupable negligence as either a wilful act or an act exhibiting other recklessness for the lives or safety of the passengers), they could consider that circumstance in awarding the amount of damage. Said the New York Court of Appeals:

> "The rule of law laid down by the court was substantially correct. Exemplary damages may be allowed not only in vindictive actions so called, such as assault and battery, false imprisonment, defamation and the like, but also in actions based upon negligence . . . And if the jury could find in this case, that the defendant omitted, either in the construction or management of the boilers the usual and ordinary means of protection, and that such omission caused

the accident, it would evince that recklessness of the lives, and safety of the passengers, which would justify such damages."

In *Ralston v. The "States Rights,"* 20 Fed. Cas. 201, 209-10, Case No. 11540 (1836), in a case arising out of a collision of two vessels, Judge Hopkinson, a noted admiralty authority, ruled that punitive damages could be awarded against a shipowner for injuries suffered through the wilful and malicious acts of the ship's captain performed in the course and scope of his employment, as follows:

> "In our case, the management and steering of the 'State Rights' were put into the hands and under the will and discretion of Captain Allen; it was his business, his employment and right, and if he abused his authority by mistake, by negligence, or willfully, to the injury of another, both he and his owners are responsible for it."

See also *Day v. Woodworth,* 13 How. 363 (1851), where the Supreme Court pointed out that the right of action to recover elements of exemplary damages "seems to have been borrowed from the civil law and *the practice of the courts of admiralty".*

The petitioner, United States Steel Corporation, has steadfastly challenged the power of a court, sitting in admiralty, to step beyond the assessment of mere compensatory damages, but the cases cited by petitioner in its trial brief lend discredit to its argument. Petitioner cites, with favor, *The Amiable Nancy,* 16 U. S. (3 Wheat.) 547 (1818) for the proposition that the owners of a vessel may never be accountable for punitive damages. The language of the opinion, however, lends the clear implication that

in the proper case, admiralty has power to assess exemplary damages:

> Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. * * * And if this were a suit against the original wrongdoers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.

The court continued, however, and stated that the owners of the privateer which had assaulted the libelants should only be accountable for compensatory damages *in that case:*

> But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages (pp. 557-8).

Petitioner has also turned the Court's attention to *Ralston v. The State Rights,* 20 Fed. Cas. 201 (E. D. Pa. 1836). That court quite clearly found against the first proposition of the petitioner's argument:

> I think, therefore, that it is not legally correct, to say that a court cannot give exemplary damages, in a

> case like the present, against the owners of a vessel. * * * There is no subject upon which more repeated and solemn complaints have been made to the public, and few of a deeper interest to the community, than the accidents, always attended with frightful alarms, and sometimes by the most fatal and melancholy consequences, from the collision of steamboats. * * * Our river has been particularly exempt from these disasters, and it should be the determination, as it is the duty, not only of the courts when appealed to, but of every good citizen to keep it so (p. 210).

The most recent authority on the subject is made by Mr. Justice Stewart in a concurring opinion in *Vaughan v. Atkinson,* 369 U. S. 527, 540 (1962), which has drawn sharp criticism from petitioner and its gratuitous supporters, Den Norske Amerikalinje and Hamburg-Amerika Linie. In that case, the majority of the court awarded counsel fees in connection with a claim for maintenance and cure. In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Harlan, pointed out that the right to counsel fees should have been based on the seaman's traditional right to exemplary damages under the maritime law:

> "However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages." McCormick, Damages § 79.

The fact that punitive damages have never been visited upon a tortfeasor in an admiralty proceeding is no reason for precluding such a recovery. The petitioner and its

supporters have adduced no persuasive authority nor have they articulated any persuasive reasoning which justifies such a preferential treatment to a maritime tortfeasor. In the absence of a specific rule to the contrary, there is no basis in law or reason for proscribing the recovery of punitive damages in admiralty.

> Maritime law draws on many sources; when there are no clear precedents in the law of the sea; admiralty judges often look to the law prevailing on the land. (*Igneri v. CIE. de Transports Oceanique,* 323 F. 2d 257, 259 (2nd Cir. 1963)).

Our next consideration is whether the death claimants, suing as they are under favor of the Jones Act, 46 U. S. C. § 688, are entitled to the recovery of punitive damages under that Act. Examination of petitioner's position here indicates either that its legal research was incomplete or that its argument is fallacious.

One of the purposes behind enactment of the Jones Act was to secure rights for seamen against their employers such as Congress had created on behalf of railroad workers through the Federal Employers' Liability Act. 45 U. S. C. §§ 51 through 60. The original Act of 1908 included a wrongful death statute modeled after the celebrated English wrongful death statute, Lord Campbell's Act, 9 & 10 Vic. Ch. 93 (1846), which permitted a certain class of survivors to sue for their pecuniary loss resulting from the wrongful death of their decedent. At common law the death of a human being, though wrongfully caused, affords no basis for the recovery of damages, and a right of action for personal injuries dies with the injured person. (*St. Louis, I. M. & S. R. Co. v. Craft,* 237 U. S. 648 (1915); *Insurance Co. v. Brame,* 95 U. S. 754, 756 (1877); *Baker v. Bolton,* 1 Campb. 493, 170 Eng.

Reprint (1808); Speiser, *Recovery for Wrongful Death* 2 (1966). In the absence of statute, the general maritime law of the United States does not authorize any recovery for the death of a seaman, whether caused by negligence or unseaworthiness. *Cortes v. Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932). *The Harrisburg*, 119 U. S. 199, 213 (1886)).

In this context, the Federal Employers' Liability Act became law. As originally enacted in 1908, it provided in §1 (45 U. S. C. §51) for two rights of action for negligence: (1) an injured employee's right of action for personal loss and suffering, and (2) a right of action for the benefit of certain beneficiaries for any pecuniary damages sustained by them as a result of the employee's death. An injured employee's right of action for personal loss and suffering did not survive; it died with him. *Connors v. Gallick*, 339 F. 2d 381 (6th Cir. 1964). However, by an amendment adopted in 1910 adding §9 of the Federal Employers' Liability Act (45 U. S. C. §59) provision was made for the survival of the employee's claim for personal loss and suffering, and also for the benefit of the designated beneficiaries.

In 1920, through the Jones Act (46 U. S. C. §688), the wrongful death and survival aspects of the Federal Employers' Liability Act were extended to seamen's beneficiaries. *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958); *Gillespie v. U. S. Steel Corp.*, 389 U. S. 148 (1964); *Hutchison v. Pacific-Atlantic S. S. Co.*, 217 F. 2d 384 (9th Cir. 1954). The Supreme Court held in *Kernan* that the Jones Act supersedes all state death statutes which might be applied to maritime deaths, and this decision has been recently reaffirmed in *Gillespie*.

It is clear, therefore, that while there can be no recovery for the decedent's personal loss and suffering before death if an action under the Federal Employers' Liability

Act or the Jones Act is strictly for the wrongful death of the decedent and predicated upon the provision allowing recovery for the loss sustained by designated beneficiaries as a result of the decedent's death, recovery for the decedent's personal loss and suffering before death may be allowed if the cause of action is based on the decedent's right, which survives under the statutes, to recover for personal loss and suffering before his death. These two causes of action are distinct. *Chicago, B. & O. R. R. Co. v. Wells-Dickey Trust Co.*, 275 U. S. 161 (1927); *Williams v. Louisville & Nashville Railroad Co.*, 371 F. 2d 125 (6th Cir. 1967; *Connors v. Gallick, supra.*

The importance of the survival statute cannot be overstated here; in law, these men, through their representatives, are raised from their watery graves and stand at the bar to demand all that the law extends to their more fortunate fellows who survived. *Pimienta v. Marine Navigation Co.*, 258 F. S. 666 (S. D. N. Y. 1966).

The case relied upon by the petitioner, *Cain v. Southern Ry.*, 199 Fed. 211 (D. Ct. Tenn. 1911), was decided under the Act of 1908; even a cursory reading of the syllabus teaches that. In the body of the opinion we find this language:

> "It is clear under the act of 1908, which was in force at the time this accident occurred in 1909, in case of an injury resulting in the death of an employee, no provision was made for the survival of the right of action of the injured employee himself. . . . Such survival of the injured employee's right of action was expressly provided for by Section 2 of the later amendatory act of 1910. . . . I also think it clear that *under the Act of 1908, before the amendment of 1910*, in an action brought for the statutory beneficiaries to recover damages for the death of an employee the recovery is limited to the pecuniary injury or loss sustained by the

beneficiaries from the death of the deceased and that *the measure of damages is compensation* for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise from the continued life of the deceased, *excluding all consideration of punitive elements,* loss of society wounded feelings of the survivors and sufferings of the deceased." (p. 212). (Emphasis added.)

The above quotation, especially where we underscore, clearly shows that the Act of 1910, providing for the survival of the decedent's right of action, includes punitive damages in the case of death.

Claimants have cited *Ennis v. Yazoo & M. V. Ry. Co.,* 79 So. 73 (Miss. 1918) for the proposition that exemplary damages may be recovered in a death action instituted under the Federal Employers' Liability Act. In that case a railroader had been electrocuted by an exposed line which had been brought to the attention of the railroad several times. The court, commenting on the wanton negligence of the employer-railroad, stated as follows:

> We will first discuss the question as to whether the instruction for punitive damages granted the plaintiff was erroneous. The record discloses abundant proof in the testimony of Boswell, that the electric appliance was defective, and had been dangerous and defective for at least a week; it had shocked the witness Boswell six or eight different times; that he had reported the dangerous and defective condition of the appliance to Desmond and Detrick, both of whom were superior officers in charge of the work and employees in the shop; and that they had, notwithstanding this notice, continued to negligently and wantonly furnish the dangerous and defective electric apparatus to the employ-

> ees until the death of Ennis was brought about by its use. So, we do not think the court erred in granting the instruction on punitive damages.

It is is perfectly clear that the survival action (45 U. S. C. § 50) permits the estate of a deceased railroader to sue for punitive damages.

Petitioner suggests that the punitive damages may not be assessed under the Jones Act since that statute does not specifically provide for such a recovery. This argument fails of support. Exemplary damages are the product of the common law and are not a creature of legislation. Thus, while certain statutes may specifically authorize the recovery of punitive damages, such specific reference is neither common nor necessary. Recovery of exemplary damages has been permitted under federal statutes which employ general language as in the Civil Rights Act, 42 U. S. C. 1983. See *Basista v. Weir,* 340 F. 2d 74 (3rd Cir. 1965). Cf. also *Nagel v. Prescott,* 36 F. R. D. 445 (N. D. Ohio, 1964); (Securities Act of 1933, 15 U. S. C. 77-77aa). As stated by the Court in *Basista v. Weir, supra,* "The federal law permits the recovery of exemplary or punitive damages:" and hold that punitive damages are recoverable under that Act which "merely states that the offending person shall be liable to the party injured in an action at law."

The Court is constrained, therefore, to find that under the Jones Act the right of a deceased seaman to sue his employer for punitive damages survives the seaman's death and the claim may be pressed by his personal representative.

We proceed to the next argument advanced by the petitioner, i.e., that the corporate owner may not be subjected to exemplary damages arising out of the misconduct of its subordinate agents. The main thrust of the claimants'

argument is devoted to a description of the Captain's actions immediately prior to the collision and for those forty fatal minutes after the collision and prior to the sinking of the Cedarville. Claimants have also offered substantial evidence that officers of the highest rank in the petitioner's corporate echelon actually participated in some of the critical misconduct in this case. The evidence stands uncontroverted that those officers were advised of the Captain's intended actions, yet did nothing to avert their disastrous consequences. The claimants, therefore, contend that the petitioner is responsible for the misconduct of its Master.

We are confronted initially with the decision of the United States Supreme Court in *Lake Shore & Michigan Southern Ry. Co. v. Prentice*, 147 U. S. 101 (1893):

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.

This decision represents the choice of the Supreme Court then between several competing views of the common law. *Pizitz Dry Good Co., Inc. v. Yeldel*, 274 U. S. 112, 115 (1927). The question of the propriety of assessing punitive damages against a corporation-employer, however, is not at all well "settled in the leading case of Lake Shore . . ." (*General Motors Acceptance Corp. v. Froelich*, 273 F. 2d 92, 93 (D. C. Cir. 1959)); on the contrary, there is a

great deal of uncertainty despite the above quoted excerpt from *Lake Shore.*

In that case the court begins by showing exemplary damages are imposed only upon one who has participated in the wrong. It then points out that this axiom applies to the master-servant relationship so that some form of participation—either authorization or ratification—by the principal is necessary to expose him to liability. The court then states that a corporate principal is liable in the same manner as a natural person for the wrongs done by his agent.

The problems which have arisen, ironically, seem to have their origin in the following dictum from *Lake Shore:*

> The rule has the same application to corporations as to individuals. This court has often . . . affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances. . . . A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal.

From this the argument is made that since a corporation can act only through its agents, and therefore is responsible for the acts of its agents, there need be no ratification of the agent's misconduct to support a finding against the corporate principal. 1 Sutherland, *Damages*, 2d ed. 1893; *Cf.* also, *Time Publishing Co. v. Carlisle Journal*, 94 Fed. 762, 774 (8th Cir. 1899). The divergence of opinion on this question has led treatise writers into a hopeless state

of confusion. As stated by the author in Note, *Corporations: Liability for Exemplary Damages,* 37 Univ. Det. L. J. 751, 753 (1964):

> The treatise writers are in a similar state of confusion. Mechem states that for the awarding of exemplary damages the principal must also be guilty of wrongful motives. Thompson gives the reasoning for both sides of the question, stating that there are strong reasons for each position. Sutherland states that there is a split of judicial opinion but he seems to favor the no ratification necessary theory because the corporation had some degree of negligence in hiring the servant, and furthermore can act only through its servants. McCormick, following the federal rules, says that the majority rule requires ratification, but that there is no logical superiority for either side. This has been contradicted by Prosser who finds that the great majority do not require ratification since the corporation can act only through its agents. The *Restatement of Torts* requires ratification by the corporation or negligence in hiring. (citations and footnotes omitted.)

The most authoritative treatment of the law of corporations, Fletcher, claims that the majority rule and the better reasoned rule, is this:

> But the better rule and the one supported by the weight of authority is that a corporation is liable for exemplary damages if the acts of its subordinate agents and servants were committed wantonly, willfully or maliciously, though not authorized or directed by the company or ratified by it after their commission. (10 Fletcher, Cycl., *Corporations,* p. 669, Rev. ed. 1961.)

This Court is in agreement with that view. Operating as we are, however, under a judicial system which pays homage to *stare decisis,* we are constrained to follow the Supreme Court's admonition in *Lake Shore* even though we feel confident that the court would make a different choice were it confronted with the question today. Even if we are required to follow the Supreme Court rule, as enunciated in *Lake Shore,* we are not precluded from imputing the misconduct of Captain Joppich to the owner of the vessel. The Supreme Court's rule would affix liability upon the owner for punitive damages if the owner expressly or impliedly authorized or ratifies the act. The record undisputably shows that the vessel owner had reposed total authority in the person of Captain Joppich to extricate the Cedarville from the dangers which confronted it after its collision with the Topdalsfjord. We need only refer to the following testimony from Captain Joseph Parrilla, General Manager of the Bradley Fleet:

> Q. Tell us, Captain, why you made no effort to reach the Cedarville from the time you first received word that she was involved in a collision?
>
> A. The Master of a vessel under these conditions has his hands pretty full, and I would never think of calling the Master, initiating a call on my part, when he is in the throes of important maneuvers of this kind.
>
> They know they can always get to us if they need assistance of any kind, and this is the real reason I made no attempt to reach the Master of the Cedarville. (Tr. 322).
>
> * * *
>
> Q. I am not trying to get you to give any answer, Captain. What I am concerned with is that a whole hour elapsed, you had a ship out there that had been

holed in a collision, she was taking water, the Admiral of your Fleet is standing next to you, and no one makes an attempt to reach the Captain of this vessel.

A. I told you the reason why.

Q. You knew she was heading for the beach, didn't you, and you knew that——

A. I knew from what information had reached me indirectly.

Q. Captain, didn't you testify yesterday that the primary concern of every Master is for his crew?

A. The safety of the crew.

Q. When you found out he had gone for the beach, what did you do about that information?

A. There was nothing to do at the moment. (Tr. 324)

* * *

Q. Captain, I find it quite difficult to understand, if there was any question in your mind, and considering your testimony about your great concern for the crew, why you didn't pick up the telephone and call the Cedarville. (Tr. 331)

* * *

Q. You didn't want to interfere with the Captain?

A. He had his hands full. I presumed he did. I am saying that from my own experience, that if I were engaged in serious activities of that kind I would have no time for the telephone. I would be worried first about my crew's safety and the safety of the vessel.

Q. Captain, isn't it true that that phone by your side was the same as though you were on the bridge of that ship with the Captain? (Tr. 331-32).

* * *

A. I don't follow your analogy.

Q. If you had been on that ship with the Captain would you have conferred with him about the proper means to be taken under the circumstances?

A. In what capacity on board?

Q. If you had been on board that ship in your capacity as his superior, you would have wanted to confer with him about the proper means to be taken, isn't that right?

A. The Master of the vessel is responsible for the actions he takes on the vessel under the circumstances.

Q. You mean that even if you had personally been on board in the pilothouse or on the bridge at the time this occurrence took place you would not have opened your mouth, but let the Captain do everything?

A. It is impossible for me to say now on a hypothetical establishment as you have just narrated what I would do, and I don't see how I can venture an opinion.

Circumstances are different in each case, as you know. I don't think I could venture an opinion what I would do unless I was confronted with the situation factually. (Tr. 332-33).

* * *

Q. Captain, even if you knew that the fracture of the vessel was such that the vessel was taking sufficient water to capsize her, would you still follow the same rule and leave it to the Captain of the ship?

A. Even if we knew that she was being listed; is that what you say?

Q. Yes.

A. I wouldn't undertake to give the Master any instructions. He is out there on the scene.

Q. So that even if you knew that she was, in your opinion, going to go down, because of the fracture

of the hull, and you knew that the Captain was going to beach her, and that she might go down, and in your opinion would go down during the course of the run to the beach, you still wouldn't take any action but you would leave it to the Captain?

A. Absolutely. I think these decisions and these actions are his. (Tr. 334-35).

Thus a member of the highest echelon of the petitioner, clothed with total authority over the affairs of the Bradley Fleet, testified that Captain Joppich was in complete control of the vessel and that his decision was the decision of the corporation. The corporation thus bestowed full and unfettered authority upon the Master of this vessel; in such a case, the corporation must accept the responsibilities for the devolution of such authority. It has been held that a corporate employer may be compelled to pay exemplary damages if its employee who committed a wrongful act was so high in authority as to be fairly considered executive in character. *Winkler v. Hartford Accident & Indemnity Co.*, 66 N. J. Sup. 22, 168 Atl. 2d 418 (1961). The record clearly discloses that in the operation of the vessel Captain Joppich had no superior, was subordinate to no higher corporate officer, so that his actions were tantamount to those of the board of directors.

It is equally clear that the Captain's misconduct was ratified by the Petitioner. The record indicates that Captain Parrilla, the General Manager of the Bradley Fleet, and Admiral Khoury, the man in charge of the entire shipping enterprise of the Petitioner, were apprised of the collision within a few minutes of its occurrence. It is clear that they both knew that the ship had been holed, was consequently taking on great quantities of water, and that Captain Joppich was keeping the men on in an attempt

to beach the vessel. No action was taken despite Captain Parrilla's testimony that he knew that the Cedarville "would sink like a brick" if her outer shell had been pierced and the hull opened, as was the case here (Tr. P. 425). Not one word emanated from Pittsburgh to prevent this certain disaster. Under these circumstances we find that the silence of these top corporate officials reflects a ratification of the wrongful acts of Captain Joppich.

We begin with the admonition of the United States Supreme Court in *Supervisors v. Schenck*, 5 Wall. 772, 782, (1866):

> Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and intended to adopt what had been done in his name; . . .

It has been further held that——

> Silence of the principal, after knowledge of the unauthorized act of an agent, may, in connection with other circumstances, be sufficient evidence of ratification. . . . (*Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712, 725 (6th Cir. 1918)).

Thus, the ratification by the corporation need not be explicit, but may be implied from circumstances consequent to the wrongful act of its agent. *Poweroil Mfg. Co. v. Castensen*, 419 P. 2d 793 (Wash. Sup. Ct. 1966); *Almar-York Co. v. Ft. Worth National Bank*, 374 S. W. 2d 940 (Tex. Civ. App. 1964). After the principal becomes aware of the wrongful act of its agent, ratification may be implied

by acquiescence or a refusal to repudiate or prevent the full consequences of the wrongful act. *See-Tee Mining Corp. v. National Sales Inc.*, 417 P. 2d 810, (Sup. Ct. of New Mex. 1966): *Petroleum Anchor Equipment, Inc. v. Tyre*, 410 S. W. 2d 230 (Tex. Civ. Ap. 1966).

Thus, in *American Photo Equipment Co. v. Ampto, Inc.*, 82 N. J. Super. Ct. 531, 198 Atl. 2d 469, 474, where the "defendant, through its president and secretary, remained silent in respect of acquiescence or disaffirmance when it was directly confronted through telephone calls" concerning the unauthorized and unlawful conduct of its agent, the court found that this silence constituted the ratification of its agent's activities. The court relied, in part, upon *The Restatement of Agency* 2d, § 94 (1958) in finding that silence under these conditions constitutes ratification "when one is directly confronted with the unauthorized act of his agent [and] according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent" (p. 474). *Cf.* also, 19 *Am. Jur.* 2d, *Corporations*, § 1254, p. 660 (1955).

While most of these cases concern ratification by a corporation of unauthorized contracts by its agents, these principles are equally applicable to unauthorized tortious conduct of a corporation's agents. As stated by the author in 10 *Fletcher Cycl., Corporations*, § 4897, p. 605 (1961 ed.):

> Although a tort may have been committed by an officer or agent of a corporation without authority and not in the course of his employment, the corporation may become liable therefor by reason of a ratification or adoption of the act. In this respect corporations are subject to the same rule as natural persons . . . (at p. 609) and if it ratifies an act, it becomes liable for personal or other injuries caused by negligence in doing the act."

Thus it appears, as a matter of law, that a corporation which ratifies an act of its agent may be exposed to liability

for all the consequences of that act. It appears, as a matter of fact, that in the instant case the Petitioner's highest officials were informed of the purported course of the Master and were aware that this course made danger a certainty and disaster a strong probabilty. Under such circumstances, there arose a duty to communicate with the Captain and take the necessary steps to safeguard the crew. Their silence in the face of this duty was a full and effective ratification of the decision of the Master to jeopardize, unnecessarily, the lives of the crew.

Through their wide experience in lake shipping, both Captain Parrilla and Admiral Khoury should have realized the probable failure of the beaching operation. Unmistakably they knew that the retention of the full crew on board was unnecessary. Had the Chief Engineer, the late Reinhold Radtke, been authorized to leave the throttle open (it could have been notiched or tied) and to lead his assistants from their engine room tomb to the relative safety of the deck, much less a lifeboat, their useless sacrifice could have been averted. Parrilla and Khoury knew this, yet they remained silent—or so they claim. Joppich did not need an audience—his 20 odd crew members standing on deck—to witness the inexorable decline of the ship's freeboard. Parrilla and Khoury knew this, yet they remained silent—or so they claim.

The situation, as it was known to Parrilla and Khoury, cried out for an immediate evacuation of the entire crew. With the Cedarville at anchor for fifteen minutes, and the Weissenburg standing by to rescue the crew (and begging permission to do so), circumstances were most appropriate for disembarking the crew immediately after the collision. What did this crisis evoke from these two experienced men of the sea? Silence. Silence despite the spector of a Captain unnecessarily exposing his crew to death and injury. Silence despite the knowledge that the Captain's efforts to

beach the ship were doomed *ab initio*. It is ironic that this silence—undoubtedly motivated by a desire to secure the favor of the limitation statutes and thus reduce or contain the legal ramifications of the collision—now operates to expose the petitioner to a far greater liability. Had these officials been motivated by a righteous concern for the lives and safety of their obedient crewmen, rather than a concern for the possibilities of limitation, we would have no cause to speak in this case. But speak we shall for speak we must. It is the finding of this court that the conduct of Captain Martin Joppich is so oppressively contrary to the dictates of good seamanship, so callously in disregard of human safety, so wantonly careless of the rights of his crew as to justify the imposition of punitive damages, and we impute that conduct to his corporate employer. The petitioner countenanced, encouraged, authorized and ratified his actions.

Many Maritime laws were built on the theory that, in time of danger, contact between sea and shore was physically not possible. Shore Officers could easily prove they did not ratify since there could not be knowledge. The Captain of a sailing vessel in the South Pacific couldn't telephone his Owner's Officer in London, or his fleet commander in Oslo. But now communication is faster from ship to shore than an ordinary long-distance call. Here there was immediate contact with the shore office, which has immediate contact with the Fleet Office in Pittsburgh. There was a 40 minute opportunity of frequent communication.

The ancient lack of privity[8] was based on impossibility

8. While the respondent has waived its defense of lack of privity by consenting to judgment against it on its petition for exoneration or limitation, its argument against the imposition of punitive damages has a subtle flavor or privity in it. We wish to emphasize that, in adjudging the respondent's liability for exemplary damages, a corporate ship-owner stands on the same footing that any corporate empoyer stands in regard to its responsibility for misdeed of an employee.

of communication. Today, the Lake Captain's first call is to the ship-owner! A fair question the trial Judge may ask himself in such a case, since he may judge motivations and self-interest of all witnesses is,—Do the owners say they could make no suggestions under any possible conditions to their Captain, because Joppich was really to busy to receive them—or do they say so to enable themselves to claim there was here no privity. Were not the owners in immediate touch with Joppich? And for what purpose? They could talk of but two things; the ship and the crew. There was no other comparably important thing to discuss. Was there anything said of the men? In no conversation were the men ever mentioned.

Captain Parrilla, on deposition, after the catastrophe, agrees that the safety of the crew is the primary concern of the Master when a ship is endangered; but he admits an utter failure to suggest this primary concern to this Master under these conditions during a half hour's busy telephoning, when his Master's primary concern was distinctly not the crew. He so admits by saying he chose to say nothing.

There were really 40 minutes here in which this Master had the opportunity to contemplate, and deliberate, and premeditate, just what he was going to do. Is it proper or not for a Judge to consider that in his thinking, he got all the help the present art of communications could give? He looked down from his bridge on his audience of over 20 of his crew who were in their life-jackets aside of the life boats and in position to leave the ship safely, whenever he could give them sufficient consideration to emit the necessary two words, but somehow for no apparent or proper reason, except his lack of concern for their safety, during this entire 40 minutes of loss of freeboard till the deck was awash, he couldn't bring himself to emit the two words. This was wilful in the sense it was most deliberate with full oppor-

tunity for reflection. It was wanton in the sense that ten lives were unnecessarily wasted: it was malicious in the sense it exhibited a total indifference for lives in comparison to property.

If ever the words "wantonly," "wilfully," and "maliciously" in their legal significance, could be properly applied to a Master's utter indifference towards the safety and lives of his crew, this is the case.

While the concise recital of the facts given above is indicative of what our ultimate findings of facts herein should be, the Court deems it advisable at this point to review, summarize, and analyze same in a more connected manner, for the purpose of better elucidating such ultimate findings of facts herein.

Our evidence was not adduced in the usual orderly fashion because with so many counsel, some of whom would leave for short periods of time to go to other courts in other cities, we were constrained to hear the evidence as they wished to offer it, at their convenience. We were required to hear the testimony taken at the Coast Guard investigations, and that taken from various depositions, as the convenience of the lawyers required, so that our record may at times appear disconnected, but nevertheless everything any counsel wished to elicit is in the record, even though there may be an appearance at times of lack of connection. Our summary of the record, disjointed as it may seem, results from our efforts to digest the evidence in the chronological order in which it was adduced.

The Cedarville was what is called a "self-unloader." It was 604 feet long, 60 feet beam; 16 hatches; it had radiotelephone; engineroom telephone; at half speed it went 5 miles per hour, and at full speed 11½ to 12 miles per hour. It carried equipment consisting of a revolving conveyor belt 450 feet long, 4 feet wide, which was contained within

a tunnel lying in the ship's center, lengthwise. To load or unload, it could be extended outwards from the ship.

From the opening statements of counsel and the evidence throughout, we learned that the Cedarville had just left Calcite, Michigan, near Rogers City, which was the home of most of its officers and crew, on May 7, 1965. It carried 14,411 tons of limestone. It had 10 feet ¼ inch of freeboard—meaning that the protrusion of the ship above the surrounding water was 10 feet ¼ inch at its deck line. The claimants say that the Company wanted to carry maximum speed. All agree that the ship departed in a fog and thereafter operated at the highest possible speed, under the order "Full speed ahead." The claimants say that the ship operated at full speed until she "was in the jaws of the collision," and that this was a violation of Rule 15 of the Great Lakes Rules of the Road:

> Rule 15. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other. (33 U. S. C. 272)

Claimants also assert that, when the Topdalsfjord failed to respond to his passing signal, Captain Joppich was required to reduce speed or stop and reverse, pursuant to Rule 26, which relates as follows:

> Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or

> intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse. (33 U. S. C. 291)

The ship's Captain says that he departed from such rules and asserts that he had a right to depart from the rules cited, under Rule 27:

> Rule 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (33 U. S. C. 292)

The claimants also say that the ship did not follow recommended courses published by the Coast Guard. The ship's officers testified that they find it better practice to so depart from these recommended courses. The log book recovered from the sunken vessel indicates such changed courses. The ship's Captain says they cut corners but that this is harmless, while the claimants say that the farther a ship goes after it increases or decreases its angle of travel from the recommended course, the more dangerous its operation becomes. The Coast Guard prescribes these courses in order to keep all vessels on parallel courses in these channels and thereby to diminish the possibility of collision. Yet here the petitioner claims that deviation is harmless.

As the Cedarville proceeded northerly and as it was approaching the Straits of Mackinac, its Captain knew that

the ships Weissenburg and Topdalsfjord were both approaching him, coming south, and that both had already passed the Mackinac Bridge. There is no question but that the Cedarville's Captain knew of these two vessels, and that he agreed with the Captain of the Weissenburg on passing signals. However, the Cedarville got no response from the Topdalsfjord. The evidence is that the Topdalsfjord preceded the Weissenburg; that it had passed the Weissenburg before passing the Mackinac Bridge; that it had asked the permission of the Captain of the Weissenburg to pass the Weissenburg because "it was a faster ship," and that it did so.

Claimants herein claim that when she moved through fog at full speed, the Cedarville violated Rule 26, in that it should have reduced its speed and that when the Cedarville received no response from the Topdalsfjord she should have stopped and should have reversed her engines, but that she continued ahead at full speed. All the evidence in the case so indicates, till very near the point of collision.

Captain Joppich testified that he tried to follow the course of the Weissenburg and the Topdalsfjord on his radar, and that when the Topdalsfjord came out of the fog, he turned hard right, and then hard left, to avoid collision, but was struck amidships on his port side. Some witnesses on the Cedarville described it as a slight bump at right angles, but the Topdalsfjord had a prow designed and constructed as an ice-breaker, and in this collision it "holed" the Cedarville above and below the water line, giving it what was immediately recognized by the Mate sent to check it as a "mortal wound." The evidence is that the effort to cover the hole with a canvas mat constructed for such purpose was completely unavailing, because it was not large enough to cover the hole, and that the ship took on an uncontrollable flow of water, and from

the time its hull was pierced, it began inexorably to sink, and did so in a final convulsive capsizing movement in approximately 40 minutes after it was struck, as a result of which ten men lost their lives, and some twenty men here claim damages for injuries and exposure.

The evidence is that the Cedarville did not have water-tight compartments. Witnesses agreed that when a self-unloader ship without water-tight compartments is holed as this one was, "it goes down like a brick." The evidence is that the Topdalsfjord, with its ice-breaker prow, penetrated the Cedarville to its hatches.

The evidence is that on collision, the Captain stopped engines and gave a general alarm; that the crew immediately reported in their life jackets. The Mate was then sent to assess the damage, and quickly reported to the Captain that the hole was too big to put the canvas mat over it. The hole was larger than the 18 x 24 foot mat. The amidships hole was so large the Captain could see it from the bridge. The Captain put an anchor out and got into radio communication with his shore office. This was done within one or two minutes of the collision. The evidence further is that the collision took place at *9:45 A. M.* and she sank at *10:20 A. M.* The evidence is that the shore office immediately called the Pittsburgh main office. Mr. Smart, Traffic Manager of the Bradley Fleet at Rogers City, was told by Captain Joppich that the ship was hit, "holed," "taking water," and in "serious trouble." Within one or two minutes, Captain Parrilla, Manager of Operations of the U. S. Steel Bradley Fleet at Pittsburgh, got the message from Mr. Beuhrens, Assistant Supervisor, who got it from Mr. Smart. Captain Parrilla testified on deposition that Beuhrens told him the ship was "holed," "taking water," and "in serious shape."

All the evidence indicates that the Cedarville steadily sank. Its freeboard of over 10 feet was, during the 35 to 40

minutes of its sinking, decreased to nothing. Its deck was awash before it convulsed, capsized and went down. At no time was any order ever given by this Captain to his men to abandon this ship. At no time was this Captain ever told by his superiors ashore, with whom he was in direct and immediate communication, to save these men. At no time were any officers or members of this crew ever authorized by this Captain to leave the ship. Lifeboats were at deck level but no one ever was authorized to enter them, or to lower then except to the deck level, or to leave the ship.

We find that the Captain of the German ship stood by at all times offering to take the crew off and that his offer was rebuffed, and that he was told to get out of the way by Captain Joppich when he finally decided to turn his ship around in an effort to beach it. After the catastrophe was complete, the German ship saved all who were saved.

Certain action was taken by the Captain after his ship was holed on the port side amidships. The Captain first ordered the engineers to pump ballast out of the No. 4 port side tank because the water had entered where the port side had been holed; that the Captain had been told that the water so entering was too much for the pumps to handle, under which conditions the Captain thereupon ordered that the pump on tank No. 4 stop and further ordered water taken in on the starboard side. The engineer who did this pumping testified that orders came from the pilothouse to "ballast on the starboard side" and water was taken in to all of the seven tanks on that side except the one water tank for boiler water. The evidence is that such seven pumps were still in operation when she capsized.

The evidence is that the Cedarville, though it was sinking, was nevertheless going down on an even keel until

such time as the water taken into all seven tanks on the starboard side caused it to capsize. The Captain testified that he ordered such ballasting to stop, but Wheelsman Gabrysiak, who had the 8:00 A. M. to 12:00 Noon watch and was thus aside of the Captain from 8 A. M. till the vessel capsized, said no such call was ever made. Witness Tulgestske testified none was made between the time he started taking on ballast and the time he left the engine room; when he left the engine room, the deck was already awash. Witness Bey, the last to escape from the engine room, said the ballast pumps on the starboard side were still going when she rolled, but that he heard no such ring. He never got to the main deck, but, as she capsized, he was thrown into a room where his leg was broken and he was able to escape through a porthole. We find that water was so pumped into the seven tanks on the starboard side as to have caused this vessel, which had already lost so much buoyancy, to suddenly lose its balance and capsize to the starboard side.

We find further from ths evidence that the Captain never gave any order to stop the intake of water into the seven tanks on the starboard side, and that they were still in operation when she capsized.

The evidence further shows that the men had put on life jackets very early in the general alarm, but that none were ever authorized to leave the ship; that the men in the engine room had theirs on too; it further shows that the Captain signalled the engine room with the chadburn and he had put that signal on "Full speed" in an effort to beach the ship, and the engine men were still obeying his orders when the ship capsized and sank; that as of the time it sank, its speed was down to 2 or 3 miles per hour, due to lack of buoyancy. We further did that, considering the position at which it sank, from the exhibits in the case, and at the

diminishing rate of its speed due to its utter lack of freeboard and buoyancy, the chance to have beached it was, for all intents and purposes, practically nil.

Shortly before the sinking, the evidence shows that the Captain had sent a man below to get him a life jacket. The ship's final convulsion and capsize threw both life boats and all men on its deck free. Its sinking hurled loose the rubber life rafts from upper deck; these rafts were later used by some fortunate survivors to keep themselves afloat. The Captain had stepped out of the doorway of the pilothouse just as the ship capsized and he was thrown clear and escaped, but the Wheelsman just behind him was thrown back into the pilothouse and never got out. Thus, while no one had dared to abandon a ship with no freeboard left and the deck awash, the ship thus abandoned them.

The deck was awash as the Captain stepped off the bridge. The Captain had been using the chadburn to signal the engine room till such a time as he decided to leave the ship. He gave no notice to the men in the engine room that he was about to leave. He had been intermittently busy at the radio telephone since the Cedarville was holed. He had a telephone to the engine room where men in life jackets were busy with the Captain's signals of "full speed ahead" but he failed to use it to tell them he was leaving, or that they could leave. They were faithfully answering his signals, though the ship was necessarily going more slowly as it lost buoyancy and freeboard and took on more water, in addition to its 14,411 ton burden of limestone. While it could attain about 12 miles an hour at full speed, it was down to two or three miles an hour before it sank. Of course the men in the engine room knew nothing of the conditions above.

This Court finds that the Captain saw there was water on his deck and that his ship had lost its buoyancy, and

that there was nowhere for the ship to go but down; that had he given any though at all to his men, and had he sacrificed just two seconds of the telephone time which he used to save his ship, for the purpose of saving his men, and had he emitted just two words into the engine room telephone to save his men, viz., "Abandon Ship," during the last minute before it sank, with five or six ways out of that engine room, some might have had a chance for survival. With any fair, due and proper notice, had they three to five minutes, all could have been at a safe distance in life boats. In fact, all should have abandoned ship when its freeboard was close to disappearance. The German Captain had considered it necessary forty minutes before the capsize.

Again, not once does this record show one word of consideration for anything but the property involved. His claim that it wouldn't have been safe to let them off was an afterthought. The Topdalsfjord had pulled out and away and disappeared. The Weissenburg followed slowly a half mile behind and saved all who were saved, including this Captain. So their danger was not in leaving; it was in staying.

Not once had he said one word about what was to be done for any one man, except the sending below of a man, very close to the sinking, to get a life jacket for the Captain.

Not one word two minutes before the final convulsion and capsize as to whether all were accounted for; whether they were all ready to get off; or to the effect they were finally permitted to leave. In fact, when the ship capsized, they were all literally thrown off of its deck, including the Captain, and to a comparatively safe distance. Of the survivors, only the Captain "went down like a bullet" in the suction of the ship, but his life jacket brought him up. The man aside of him never made it.

Never one word or thought was given to the men below who were about to be drowned, just to keep it full speed

ahead, when there was only one place it could go, and that very apparently was not a beach. Their's was a misplaced loyalty and obedience to him. His was a false sense of duty to protect property regardless of its cost to 30 faithful seamen and their families. Were it not for the Weissenburg many others and this Captain could have lost their lives.

Out of the 35 to 40 minutes he had had in which to do something to save the ship or save the men, this Captain would not give up the necessary two seconds to say the necessary two words to keep the engineroom men from being needlessly and uselessly drowned. One or two more seconds could have saved his Wheelsman besides him, who lost his life because he was a step behind the Captain in leaving the pilothouse as the ship capsized, convulsed and sank. Even there, this Captain put his own interest first, and it paid off.

The Captain asserts throughout the case that his first thought was for his men and not the ship. However, his actions are more demonstrative, more vocal, than his words. Not one of these men was ever authorized to abandon or leave this ship. The ship's convulsion threw over twenty of the men off, it threw the lifeboats and loose rafts off; it threw the Captain off the pilothouse, and it threw the Wheelsman within.

On trial, this was all said by defense to have been done on a "calculated gamble" to save the ship. "Calculated" is a misused word here. If the Captain or anyone knew exactly where they were in this fog, or where the closest beach was, or how to avoid shoals, or how to plot the prospective movement of the vessel, there is no evidence that there was any real "calculation" about it; no one knew whether there was any chance to reach any beach at the attainable rate of speed under the prevailing conditions. The Captain finally, after the loss of the first fifteen min-

utes, ordered the German vessel out of his way while he tried to turn his ship around and go full speed somewhere else, but it soon capsized and sank so fast that this could hardly be said to have been a "calculated risk." This was "no calculated risk"—it was a horrendous gramble.

There was really no opportunity for a "calculated" risk because from the evidence in this case, it is clear that this Captain really did not know his vessel. The petitioner never provided him with, nor did he ever seek to discover, the trim and stability data of his vessel. He had never seen the hydrostatic curves of his ship. He did not know the metacentric height of his vessel. In short, Captain Martin Joppich had ignored the maritime edict that "the Master must know . . . the maneuvering qualities of his own vessel." Griffin *Collision* 576 (1949).

Yet, before a rational decision could have been reached to beach the vessel—rather than abandoning her—it would have been necessary to calculate the loss of buoyancy, the trim and stability, the speed attainable, the distance to be traveled, and the time which the vessel could remain afloat, under all the conditions then and there obtaining. Yet not one of any such requisite calculations was ever made (Tr. 883, 885-886).

Obviously all the consideration and thought of this Captain was for the ship alone, with the expectation that he could finally step off in safety because he had the advantage of looking down at the entire scene from the pilothouse, and no one else could or did move till he said so. Ironically, the capsizing ship made the decision which he was so grudgingly reluctant to make. It literally catapulted everybody and the lifeboats and rafts off of its deck and into the surrounding water.

These claimants claim that the engine throttle could have been set at full speed and the engineroom men could

have come up on deck and have had a chance for safety. The Captain stated that he did not think so. With so many years on ships, beginning as a porter and working his way up to Captain, he had been in enginerooms often enough to know that a throttle could be set in a notch, or tied, and that the engine would continue to operate for some length of time before need of any other manual operation. That was the testimony of the engineers who survived.

Again, he defends by an afterthought, because if he should say he knew the throttle could be put in a notch, that would be tantamount to admitting that his engineroom men were needlessly held at their post and drowned. Petitioner claims it would have been dangerous to thus have an engineroom unmanned. The engineers dispute this. There certainly was danger here, but it emanated from this Captain's callous disregard for his duty to men chained to this sinking coffin by their own devotion to duty towards him. Joppich was not really concerned with another collision here because he was again operating in fog and the highest speed attainable. Joppich knew that the throttle had notches for some purpose. He forced those men to work in imminent danger of drowning to save a ship already doomed by all the laws of nature and physics, which it was his business to know and understand.

Other witnesses who worked in the engineroom stated the throttle could have been put in any one of its several notches and the engine would have functioned. When the Captain was about to leave, he knew that there would then be no one at the wheel and that he had no further need of engine propulsion; and yet he stepped out of the pilothouse and sent the men below to their doom, for lack of two words.

When informed of the danger to their property, the officers of the ship's company, the owners of this vessel,

made no move or gave no order or suggestion to their Captain to give their men any preference over their property. This they could easily have done to the ship or to the near-by-office. No one on either end of that phone says that one word was said, at either end of the line, about these men. As experts, (one was once an Admiral in the United States Navy), they knew there was little or no chance to beach this ship under these conditions. But whether there was or not, had one word been said by the owners about saving these men, this Captain might then have given some thought or word to them. Under all these conditions of the immediate danger of sinking, even with the deck awash, this Captain never authorized any one man to leave this ship. The sudden capsizing and convulsion of his ship threw his men and himself off its awash deck, but he never gave them permission to leave. As the Captain stepped off he gave absolutely no word or thought to these men below, whom he now professes to have known so well and to have so highly regarded. Those awaiting on deck stood in his sight through more than one half hour's agonizing anxiety, and he never uttered the two words which would have released them from their obligation to him.

Irrespective of anything which may have been said in the various phone calls between this Captain and his principals, the owners of this ship, there was nevertheless a responsibility on these owners and their representatives, as well as on this Captain, to give some little consideration to all these lives then in such imminent danger. They had 45 minutes in which to talk about it, and did so; they only had two things to talk about, the ship and the men. There is no shred of evidence before us that anything was discussed other than their property. In all his time on the phone the Captain does not say his crew was ever mentioned. Nor does he say in the 45 minutes in which he had

to say something, though he did gives orders to save his sinking ship—that he ever said one word relating to the safety of a single person, except to the man whom he sent to get his own life jacket. In concluding his deposition testimony, the Captain admitted that he had a thirty second warning that the ship was going to capsize, and he reiterated that it's speed had slackened to about two miles per hour, but he used that 30 seconds for himself alone.

In concluding his testimony the Captain had further stated the ship sank 40 minutes after the collision; that he was thrown off the ship when it finally convulsed; and he went down with the suction "like a bullet;" that he was 45 minutes in the water, and he swam and was rescued by a German lifeboat; that the speed of the ship before it sank was down to two miles per hour; and that he had a 30 second warning that it was going to capsize.

So it is apparent that he knew very well that he couldn't beach this ship because all its freeboard was lost in that last half hour and it would have taken at least another half hour more to reach any beach at the rate he was going of two miles an hour. He had given all his thinking—all his activities—all his efforts,—to two things; to salvaging the ship, and to having that finally necessary few seconds to get himself off a ship whose final sinking was as certain as it was imminent.

Wheelsman Gabryziak testified that it was foggy; the fog was so heavy he couldn't see the pilothouse. He noticed the clock on the pilothouse at time of collision: 9:43: that the ship was put hard left when collision was close, as the other ship came in sight, and then hard right; that after impact the engines were immediately stopped and the anchor dropped. The other vessel made a 45 degree change after collision. The general alarm was immediately sounded. He testified that the Captain was then engaged

in talking on the phone: a "May Day" distress call went out; he left the pilothouse when the ship settled to port to get life jackets; then the Captain wanted the anchor up, but it was "hung up." The Cedarville listed heavily to port to a 35 degree angle. *The Captain was constantly on the phone making communications;* the Captain backed the ship, which freed the anchor; the Captain ordered the engineroom to get her at full speed ahead. Water ballast was taken on to lessen its list, but it necessarily decreased its buoyancy because so much water had filled the ship, since it had no water-tight compartments. *The ship was under way for 25 minutes, then it listed 40 degrees to starboard, and sank.*

At the end, the ship started to roll for a couple of seconds—then it rolled altogether—the Captain shut the telegraph off. A "May Day" call was made just before she rolled. She rolled to starboard; he went out on the port wing; the rolling put him in the water.

He testified that before the collision there had been continuous fog signals and three or four long blasts but no response. We find that it is very obvious that in such a fog that Rule 15 was here violated because in thick weather, and in such fog, the vessel should have been put at "moderate speed" and taken off "full speed." We find it was at full speed in heavy fog long before this ship because aware of the presence of other ships.

We find that here Rule 26 was violated because the pilot who fails to understand the course or intention of an approaching steamer, from erroneous signals *or other causes*, or the pilot *in doubt*, shall, under such rule, sound several short and rapid blasts of the whistle, and if the vessels are within one-half mile proximity of each other, both should reduce steerageway, and, if necessary, stop and reverse. Since Captain Joppich received no answer from the Top-

dalsfjord, he was surely in doubt of its intentions and he was then within a half mile of its proximity; he should have reduced to steerageway, and if necessary, stopped and reversed. Had he done either there would have been no collision.

We find that had this Captain not operated at full speed through this fog, on this occasion, there would have been no contact. The evidence is that not only did this Captain operate through fog at full speed on this occasion but that he always operated at full speed through fog on all other occasions. In fact, there is evidence here that such is the practice in this fleet. This has to be known by the owners of such vessel and fleet because of the recorded distances this ship and others have covered within specified times, for a long time. Such is known from their log books and from daily specified telephonic reports at particular reporting times. We find from records and reports they know and knew here that their ships generally travel full speed through fog, and have done so far a long time.

Rule 27 allows of departure from other rules when such departure is necessary to avoid immediate danger; Captain Joppich has here testified that his departure from the Great Lakes Rules of the Road were based on what he calls the "prudent rule," and he interprets Rule 27 as giving him the right and power to depart from the Rules regarding dangers of navigation and collision, and to consider special circumstances which may render a departure from the above such rules necessary *to avoid immediate danger*. Was not much of this danger of his own creation? How did violating Rule 15 avoid immediate danger? How did going full speed ahead in heavy fog avert any danger? How did failure, when the Captain-Pilot was in doubt, under Rule 26, to sound several short, rapid blasts of his whistle, avert any immediate danger? How, under Rule 26, when within half a

mile of another ship, did this Captain's failure to reduce to steerageway, or stop and reverse, avert or avoid danger? We are constrained to find that his own failures in these many respects created this particular danger of collision. We find he did not avoid danger; he created it. The fact is that the full speed ahead in fog cannot be excused by the claim that this Captain was so "prudent" that he comes under the protection of departing from rules under Rule 27. There can be no proper legal departure from the rule against full speed ahead in a fog. And this Captain blandly asserts the right to so operate at all times and says he so operated in all fogs. In each case, as he violates rules, his claimed motive is "Prudence." The Rule was intended to prevent full speed ahead in fog. Full speed in fog does not constitute "prudence." Rule 15 requires moderate speed, and sometimes bare steerageway, and navigation with caution under certain condition. No one has a right to flagrantly violate this rule and then justify his violation by describing his own misconduct as "prudence," which is this Captain's fallacious defense. His habitual full speed ahead in fog has to be known to his company. They ratify it by not ordering him to discontinue such a dangerous practice, year in and out, on all his voyages. Their failure to order him to stop such practice indicates their desire that he continue, and thus they ratify and approve the practice, for it has the advantage of completing such voyage, quickly. Speed may be to their ultimate advantage, but it never justifies such deliberate violations of Rules as happened here.

Rule 27 did not give this Captain the right to violate Rules 15 and 26. Rule 27 protects men who seek to avoid danger caused by the errors of other navigators. It is no shield of protection for navigators whose violations cause collisions, such as happened here.

Third Mate Cook told the Captain they were four miles from the beach when they started. They best they could make was five to six miles per hour, which had gone down to two miles per hour before the sinking. Obviously, at two miles an hour, they needed a half hour to go one mile. From the point of sinking indicated on the Map, Freedman Exhibit 45, it does appear that they could never have made it, nor did the Captain or anyone else ever express any confidence they could. This really means they had no reasonable chance of saving the ship by beaching. The Weissenburg had offered to take off the men immediately. When there was over a half hour left in which to take them off, and since the "mortal wound" had immediately appeared, the offer should have been accepted, had the Captain put the men ahead of the ship, or had he considered them at all.

The First Mate Piechan, 31 years at sea, when questioned by Lt. Commander Gove, related that their course began at 317 degrees, full ahead, in a light fog, visibility 1¼ miles, fog signals blown every minutes, automatically. They changed to 305 degrees; changed course at 7:48, radar operating well. He turned in. While still asleep, he heard alarm bells, saw his ship was struck but did not see the Topdalsfjord on the port side; he had felt a little impact. He went back to quarters and dressed. The Captain told him to get the collision tarpaulin. It consisted of a canvas, with two lead pipes at each end, and ½ inch ropes. The ship was already listing. He put it over the hole on the port side. He saw that there or four feet of the spar deck was cut into. The hole "looked awful wide."

He looked down into the cargo hold from the top. There was water in the cargo hold, a tremendous amount of water, and more than the pumps could hold. The vessel listed 10 degrees; the hull was cut to the water line and past the water line. The hole was too big; the tarp stayed out from the ships' side.

Lt. Commander Gove of the Coast Guard questioned Gabryziak, then represented by counsel Keenan, who is also counsel for U. S. Steel Corporation herein. Gabryziak stated that he was a Wheelsman on the 8 to 12 watch; he had been 17 years with the Bradley Fleet of the U. S. Steel Corporation. It was the testimony of Gabryziak that they passed close to Cheboygan Buoy and changed course 268 degrees right to 302 degrees. Steered 302 degrees till a pip showed close on the radar; then 305 degrees full speed; then 310 degrees. The Captain called the ship (the Topdalsfjord) but got no answer. The Steinbrenner told the Captain he also called the ship and got no answer. They gave fog signals. Continuing in 310 degrees, the Cedarville passed the Ford, but the Topdalsfjord was still "coming at us." The Third Mate warned the Captain of the proximity of Major's Shoal; the ship was steadied at 325 degrees. After that the Captain reduced her to half speed, but the Topdalsfjord "was bearing in on us." We gave one long blast and the Captain tried again to reach the Topdalsfjord. The Cedarville could come no further to the right of the channel because of the proximity of the shoal. With the Cedarville still blowing short blasts and a long blast, the Topdalsfjord suddenly appeared out of the fog on a 45 degree angle. The Cedarville held to "slow" when the Topdalsfjord was first sighted, approximately 600 feet away. When it was 100 feet away they were still on 325 degrees. The Captain put the engine full ahead and hard right and hard left on the wheel; the other vessel was "perpendicular to our bow," and on a steady course, and the Cedarville was struck amidship on the port side. Gabryziak knew it was a mortal wound. He went back to get the boys to the lifeboats and "have no panic." He told the Captain the tarp would not hold. The Captain said he would try to beach her.

The gash was between the 10th and 11th hatches. The cargo was down 8 feet.

The boats were lowered to the bulwarks. She was settling but had straightened up. At the last second, Piechan, on his own, said "Get in the boats, boys." She flipped so fast to the port side and then to the starboard side—he had one foot in but didn't make it. When she flipped and sank he found himself in the water—he got on a raft and saved Idalske. He saw the German ship coming up. Six men pulled him onto the raft. They had only one oar. He was cold and numb. His watch stopped at 10:25. It was a steady capsize and fast.

Captain Werner Otto May, Master of the Weissenburg, Hamburg-Amerika Line since 1955, on deposition said that he had captained this ship since 1955, that it has radio telephone. He does 14 knots on the ocean; 9½ at half speed on lakes, 6 on Slow.

He let the Topdalsfjord's Captain pass him at the Mackinac Bridge because the Topdalsfjord's Captain said "he was faster." The Topdalsfjord had to slow at the bridge because of "heavy traffic." He passed the bridge at 9:38. At 9:45 he heard the "May Day" call of the Cedarville after its collision with the Topdalsfjord.

At 10:45 he heard calls for help from his bridge. There were men in the water. He put down lifeboats; he saved four men and took in one dead. After the Cedarville sank he saw the bubbles. He had kept one mile behind the Topdalsfjord; he had heard signals from both ships.

The Cedarville was a blip on his four mile range. It was misty and foggy. The Weissenburg sounded its fog signals. The Topdalsfjord was a mile ahead of him.

He had told the Cedarsville Captain there was a Norwegian ship ahead of him; the two ships were apparently approaching each other. The Cedarville was on his starboard. He wanted to keep a mile from the Topdalsfjord. When he passed the Bridge the Topdalsfjord was

in front of him, and the Cedarville was one point off on his starboard side. Looking at his radar he could see "They are coming together now." Two minutes later he heard the "May Day" call. *The Cedarville had gone North of the normal line, a little north of the course.*

The Cedarville's Captain called him and told him "someone hit me, would you like to give me the name?" And then asked him for the "name of the Norwegian Ship."

He stated, "At the moment I am fine," but "He'd like to have the name of that ship."

When Captain May asked Captain Joppich on "what side he should come in to take off the Cedarville's crew" the Cedarville's Captain said, "Get of my way—I will try to beach her." Captain May further related as follows "He passed my bow, and he turned nearly around me, so he must be on a—let's say—westerly to southwesterly course—to go behind me—and I heard his voice, and a very fast going engine—like an old steam engine—and I saw a shadow—and then I stopped my ship by maneuvering—you can see it in my rough log book—to come clear of him." "He was aft of me and he came back to my starboard side and that is the moment—from this moment on—I followed him, really, because I said, "Don't lose him, there must be something wrong—because I heard the noise,—the propeller was very high out of the water." I was worried he didn't know where to go. He went around like this on full speed, his engine running." He also said, "I'd like to ground her."

Captain May testified that on hearing the "May Day" call he went to Slow speed; then to 3 to 6½ knots at 9:45; then dead slow ahead till the Captain told him he didn't want any help.

He stated that the men were not ordered off fast enough; that the Captain should have let the men off

sooner since he had no further use for them. Indeed, there was no *evidence anywhere in the case that Captain Joppich had any possible need or use for any one of these 20 or more men who stood in life jackets for one half hour waiting to get off*. Captain Joppich at no time ever stated there was a need for any one of them to remain.

Captain May testified that the Cedarville Captain seemed slow to understand that his ship was going to sink.

He further stated that when Captain Joppich decided to beach his ship he operated it "astern behind me," and went in a semi-circle. He also said that as the Cedarville moved ahead he went on Slow behind her; that his lookout man saw a white boat on his port bow. The Cedarville was on a southeast course; that he could see the Cedarville going down under the water. The Topdalsfjord was half a mile away and did not follow the Cedarville.

He stated he'd heard men cry in the water; he took the first survivor between 10:46 and 10:49. He picked up seven men on a life raft and fourteen men with one dead in a boat; and later four survivors and one dead body. He arrived at the scene at 10:45. It took nearly an hour to get the last survivor aboard his ship. He put over a derrick as some men could not use the ladder. He said the visibility had been 150 feet, and he heard a "hard going engine and voices. The Cedarville went from there around me like that."

Captain Gilbert testified he'd been 32 years on the Great Lakes; that he was in command of the Steinbrenner, a freighter, and was upbound on May 7, 1965 for Green Bay, in South Channel, 302 degrees, in dense fog; that he talked to the Ford at 8:33; he gave whistle signals to the Topdalsfjord four times and got no answer; this was in dense fog and blowing signals, but no response. The Topdalsfjord passed 200 feet from him moving quite

rapidly, going 4 to 6 miles per hour. At 9:50 Captain Gilbert got the Cedarville's "May Day" call that it was hit amidships and "may be sinking."

Walter Tulgetske testified that he was a sailor of 26 years' experience, having joined the fleet in 1940, and that he had put in some 27 months in the U. S. Navy, and that he had been a Chief Engineer since October, 1964.

He related that as a general rule on alarm men get topside, put on their life jackets, and take their stations. He stated a card at each man's bunk tells him where to go on an alarm signal. He related, on examination of Counsel Keig, that here had been no general alarm. Describing the ship, he stated that the ship had three decks, with the engine room and coal bunker aft; that the trottle controls were in the engine room; that the chadburn was behind the throttle; its signals were given by electric power. It had a bell which was noisy. The ballast tanks contained water; there were eight on each side.

There was one oiler, one stoker and one engineer; the engineer makes the necessary changes; the oiler is on his rounds; the stokeman is in the boiler room. The chadburn can be heard everywhere. There were five or six ways to get out of the engine room.

He related they were going full speed in dense fog. That fog whistles tell them that other ships are around. That there was a blast of 30 to 60 seconds and then he "felt and heard a thud." He saw the bow of the other ship. He was not thrown off his feet. The No. 4 tank was the area of damage.

He went down to start the pump to pump out the water on tank No. 4. It took three to five minutes to start it. The main engine stopped and started. It has a 5250 gallon capacity a minute. The oiler went with him. He saw there was water in the tunnel. The ship showed a three foot list,

which showed on the gauge board. The ship was coming back to an even keel. They were going to look topside.

He saw that all freeboard was lost. No general alarm was sounded. No order to abandon was given. He got in a lifeboat. He was then one minute out of the engine room. The lifeboat was five feet from the water, bow down first. The ship lurched to starboard; he jumped out of the lifeboat, outboard (meaning away from the ship). The ship was going down, its stern still in momentum. The ship rolled to starboard and down by the bow.

This witness stated that the throttle in the engine room was set by notches and that the throttle would remain set whenever desired.

He also stated the lifeboat never came afloat.

He stated that he never knew what the Master intended.

He further stated that the main engine was operating when the vessel sank.

He was in the water a half hour when picked up by the ship's lifeboat and then by the Weissenburg, whose operation was good.

At the Coast Guard hearings, Tulgetske was examined by Commander Gove, and represented by Mr. Roman Keenan, who also represents Petitioners herein.

He had been the First Assistant Engineer on the Cedarville. Below deck he heard a thud, and a long blast; he could see the bow of the other ship, and he grabbed a life jacket. Water was rushing through the gangway. There was a three foot list to port and he was ordered to ballast on the starboard side, all on orders from the Chief Engineer, who got his orders from the pilothouse. He was ordered to get more help. He worked on the pumps. One handled 3600 gallons a minute; one 5250, each of two, 2000. They could pump 11,850 gallons a minute. Finally, the Chief Engineer said "There is nothing more we can do."

The ship was setting and taking water on deck. It started to roll. He jumped into a lifeboat. He knew they could get swamped in a lifeboat. He could see the rudder and wheel up in the air. He jumped outboard from the lifeboat. Another lifeboat later picked them up. The Weissenburg was good to them.

The last time he saw it there was a six inch list to port on the inclinometer.

Ivan Trafelet was the 8:00 to 12:00 Lookout. His task was to look for danger and to listen for signals. There were three in the pilothouse. At first it was quite foggy; they could see a half mile; the fog thickened; they were giving fog signals.

He stated that there was no general alarm given; that the anchor was dropped four minutes after the collision; there was a port list; he got a lifejacket and went back to the bow. The damage was to the port side, and the list was 20 degrees.

The First Mate, Pierchan, told him they were trying to beach it. He didn't think he could do anything after he learned they were beaching it. It did not have as much freeboard. The water was coming on deck. He went to the davit. There were two men there. The lifeboat had such a list he couldn't make it. There was then 600 feet of visibility.

Ivan Trafelet, when examined by Commander Gove of the Coast Guard, related that he was a Watchman on the Cedarville and his job was to see and hear. He was on the port wing of the pilothouse. Visibility was fair. The Cedarville was blowing fog blasts.

He saw a ship and reported to the Captain. It was 45 degrees off the port bow. It was 600 feet away. The other vessel was a boat length off, 600 feet. It was 600 feet between vessels.

He saw the Topdalsfjord hit the Cedarville "approximately amidships." He heard the Third Mate say "They've got to drop anchor." The anchor took hold. They had to back up. The anchor came up. The First Mate said they were "going to try to beach it."

The freeboard was getting low. The water was coming on deck. He got a cut in the head, and was in a daze; he was a half hour in the water.

William John Friedhoff, 10 years on the Lakes, was on Watch 4:00 to 8:00 A. M. He was an oiler who worked on the engine oiling system and the water pumps. They were struck by another ship at 9:45 A. M. He saw the bow of the salt water ship backing off. There was fog.

He took the cover off the port lifeboat. He cranked the boat down to the railing; he said there was a little port list; eight or ten men were there waiting for orders, but they never got any orders—they got no orders between the collision and the sinking. Water was coming down the side amidships so they got in the lifeboat.

She rolled over, in mid-air. The ship was on its side when he hit the water. The boat was free when he came up.

They had been going full speed in fog. It was a slow boat.

When they were first hit she bounced up and down a little bit, "enough to wake me up."

Louella Jane Brege testified that her husband works for the Bradley Transportation Company; that he is 39 years old and has been on the Lakes 19 years. The preceding Sunday evening (before giving her testimony) she talked to Radtke, Parrilla and Lang about her testimony. She lives in Rogers City. Her husband had been First Assistant Engineer; he is now a Chief Engineer. This was not a social call; it was a pre-deposition call.

She has a ham radio set. She listens every day. It's on all the time, morning to 7:00 P. M. Stations 22 and 51. She hears boats on 51. Turned it on at 7:00 A. M., Channel 83, for ships. Listened at 11:00 A. M.; talked to her father about this. Stunned at the news. Heard talk with Coast Guard. The word was around she heard it on radio. She heard on 61, the Michigan line on the Central Radio, asking the position of the Cedarville of the Coast Guard. "Please stand by till the Munson is there." "They said that certain men were on the Weissenburg." "There was a certain number of men on the Weissenburg and bodies, and a certain number on the Coast Guard ship."

The testimony of Harry Bey—the last survivor from the engineroom—presents a harrowing tale. Bey, on his deposition, said he was born June 18, 1921, at Rogers City, that he was a First Engineer in the Bradley Fleet, and that he had been in the Navy Reserve, World War II. He said also that there were two direct means of communication between engineroom and pilothouse of the Cedarville: a chadburn and a telephone.

They had been going full speed in fog. His watch ended at 8:00 A. M. He had been sleeping and he heard a rumble like running aground; he went back on the deck and helped get the pumps working. The Chief, Third Assistant and oiler were in the engineroom.

When the water was lapping on the main deck, the ship rolled over and a wave caught him; he was washed into a room; his leg hurt (it was broken); he couldn't open the door. The room was full of water when he crawled out of a porthole. There had been no general alarm bell. There had been no order to "abandon ship." All pumps were running full, filling the starboard side of this vessel with enough water to tilt the ship into its final convulsion. He too said that the Cedarville could have run with nobody in the en-

gineroom, that "You could leave with no one there for some time. The throttle would stay in position until it was changed." He stated that he heard no talk of getting the men out. No warning was given to the crewmen in the engineroom that the ship was about to submerge. There was no water in the engineroom to warn them.

He also confirmed that they had gone full speed in fog, and that the fleet always operates full speed in fog.

At the Coast Guard hearing, when questioned by Commander Gove, Bey again said that he was asleep when it happened, that when he was washed around in the room his leg was broken. He reiterated that one lifeboat was capsized to starboard. He was in the water 10 to 15 minutes. He was taken in tow to the German ship and struggled up the gangway onto the ship.

Before Commander Gove of the Coast Guard, Rasmus Hoagland, Master of the Topdalsfjord, stated he started for the North American Lines in 1925, became a Master in 1951, and took the Topdalsfjord in 1959. This was his 18th trip on the Great Lakes, through the Mackinac Straits every time, in and out,—four times in fog.

He was on the bridge; the pilot and he claimed to have visibility for five miles. The Second Mate, Wheelsman and wireless operator were with him on the bridge. His ship was 423 feet long; 54 beam; 6200 U/P.; Diesel Motor Vessel and carried general cargo. She had five cargo hatches, 3 forward of the bridge. On May 7, 1965, she was bound for Port Arthur. Visibility was reduced from 4-5 miles to ½ mile. He then cut his speed proceeding on dead slow ahead, 30-40 R. P. M. 3-4 miles through water, at half speed, she could do 8.5 to 8.7 and at full out 15½ miles per hour.

He asked to pass the Weissenburg. He did so. He could hear the Weissenburg's signals. He saw a vessel coming from the East on his radar; he want to slow speed

at 0903; the other vessel was approximately 4 miles east. He passed a vessel 2 miles West of the Mackinac Bridge.

The ship passed the Bridge north of the center line; and he decided to go by in the South Channel. He heard a whistle, fog signals, and an echo on starboard bow. He changed to 108 degrees under the Bridge; the echo was heard again at 20 degrees off the starboard bow; Range 1½ miles on radar. The Topdalsfjord continued at a reduced speed; at 0935 it was still on dead slow. He heard signals astern—from the German vessel. Again from the bridge of that ice-breaker he heard the echo and the whistle —3 short every minute. At 0943 he could not see the approaching vessel so he stopped the engines. Speed was estimated at 3-4 miles per hour.

Then he heard a screaming long blast, then saw the shadow of a ship; he backed the Topdalsfjord once or twice. Visibility was about 200 yards or more. The Cedarville had a swinging effect to starboard slightly; blowing long, long, long blast. He claimed that this was the first signal from the Cedarville; a long blast before he saw her; and that she was still blowing when she came out of the fog. He believes he was stopped when the contact was made. His vessel vibrated terribly on contact. It was like a bang; a bump.

The bow of the Topdalsfjord—reinforced for ice—hit the Cedarville about amidship, for a fraction of a second imbedded, and then he dragged the ship over and headed down another course. He said the Cedarville was doing about seven miles per hour when contact was made.

He heard the Captain of the Cedarville say "I'm on a hard left wheel and trying to beach her." Then, "We are listing." Then he gave the impression "it was not so bad and he was hoping to beach her." He fixed the time of collision at 9:45. He had blown fog signals. He'd heard the

Weissenburg tell the Cedarville that it had another ship ahead. His lifeboats were manned and they searched for survivors till 4:00 P. M.

Then from deposition of Captain Gilbert, Master of the Steinbrenner, we find that he had talked to Captain Joppich. There was a mark on his radar screen. The Cedarville Captain said something to the effect that "if foreign vessels used pilots who knew rules" there would be less trouble.

Captain Joseph J. Parrilla was asked by Counsel Kleig if Captain Joppich had a drinking problem.

Albert R. Millberg, Radio Officer on the Topdalsfjord, said they collided with the Cedarville; the Skipper called the Coast Guard; he told the Weissenburg of the collision and to stand by; the Weissenburg said they could hear shouts and men crying; he heard the Weissenburg had two injured.

They had heard the Weissenburg and Cedarville talking; could hear "good", but the signal had no strength after the collision.

Jan Gonstal, Second Mate of the Topdalsfjord, saw the Cedarville at 50 to 60 meters; it was struck in center, amidship; it was going five to six miles per hour. He heard a "soft impact." Just before the collision he heard his Captain say "hard starboard rudder" and "full reverse of engines." The Captain put his engines in reverse.

Karl Fagerli, Chief Officer on the Topdalsfjord, related before Commander Gove, they hit the ship behind the bow; his ship was high.

He said they never stuck in her side; they "scratched along her side."

At the Mackinac Bridge he said the visibility was sometimes a mile, then fog.

In the Coast Guard Supplement, Captain May of the Weissenburg relates that he gave the Cedarville Captain the name of the ship which hit him.

He stated he did not hear the Cedarville calling the Topdalsfjord.

Captain Joppich, at Coast Guard hearing, on 5/18/65, repeated his history. He had once been in Coast Guard; in 1946 he became Third Mate, in 1952, Second Mate, in 1954, First Mate and finally Captain of the Cedarville.

He'd made 1,000 trips through the Straits.

He related there was an inter-com on the ship; he was bound for Gary and radar was O. K.

He stated that "We should have pilots on those ships."

He said they had no trouble talking to the Weissenburg, but when they called the Topdalsfjord they got no answer. They couldn't "get a line into the Topdalsfjord."

They were going 2 to 3 miles per hour on slow speed.

The Topdalsfjord was at a 45 degree angle from him; 900 feet away when he first saw her, going 6 miles per hour. It was coming toward him at a 45 degree angle. He put the chadburn full ahead, and turned hard to right and then hard left but was hit at right angles. "He listed me to starboard." It did not knock him off his feet. He'd been listed 10 degrees to starboard.

"We had gone hard right on 325 degrees, then hard left, which slowed us down;" he then spun the vessel left to port before impact, and threw the stern away from him. "The Cedarville was going 5 miles per hour." The port side was damaged; penetrated.

The ship suddenly lurched. Joppich said, "There was no time for signals; no nothing."

Thus endeth our summary of the cogent testimony as chronologically adduced.

The strongest human instinct is self-preservation; consequently, in law, men have a right of self-defense. One

has an inherent right and duty of preserving his own life. When one gives up such right to the control of the Master of a ship, that Master has correlative duty of becoming his protector; he has a duty of using his superior skill, experience, and knowledge to protect him. He has a duty of considering the lives and safety of his crew as being more necessary of preservation even than that of the owner's property. In this catastrophe, we find that this Captain utterly failed to do so. He gave all his attention, effort, thinking, and activity to saving property and on single thought, express or implied, to his men. He had an aberration for saving property, and an amnesia for saving people. He overlooked the fact that some thirty lives on that ship were as important, in law, as his own; and, that from the viewpoint of the Captain's duty, that each and every one of such thirty lives was more important than his own in the sense that they loyally transferred to him their right to live, while he, by what he did, considered all of them as being entitled to less or no attention from him, than a ship which from the moment of collision, could proverbially not have been saved "by all the King's horses and all the King's men."

Had all the ships on the Great Lakes answered the final May Day call for help made by Captain Joppich, immediately before the sinking, their combined power could not have lifted the Cedarville to another single inch of freeboard. The ship was as doomed as were the more than twenty men he looked at and could not see.

* * *

In view of our ruling on the law, and the evidentiary facts as we find them, this Court makes the following findings and comes to the following conclusions, some of which have been heretofore intimated:

FINDINGS OF FACT.

1. Prior to collision, and up to a point where collision was inevitable, the Cedarville proceeded at full speed ahead in a dense fog.

2. It was the general practice of the Bradley Fleet to order its ships to proceed at full speed ahead in the fog.

3. Prior to collision, the Cedarville, pursuant to order of its owners, deviated from recommended courses published by United States Coast Guard which regulate the flow of traffic thru the Mackinac Straits and the confusion resulting therefrom contributed to the collision.

4. Prior to collision, when the Cedarville received no signal from the Topdalsfjord, the Cedarville failed to sound a danger signal and/or reduce speed.

5. The internal construction of the Cedarville so permitted the proliferation and distribution of water surging thru a break in the outer shell as to render the swift sinking of the Cedarville a certainty.

6. From the moment of collision, considering the construction of the Cedarville, the damage inflicted by the prow of the Topdalsfjord, and the additional 14,411 tons of cargo, and her position in the water, it was obvious that there was no reasonable chance of successfully beaching this vessel.

7. During the seventeen minute interval between collision and the turn for the beach, while the Cedarville lay at anchor with the Weissenburg nearby begging permission to come alongside, the entire crew could have been evacuated in complete safety.

8. A majority of the members of the crew who were topside were assigned no duties prior to embarking for the beach and performed no duties during the beaching attempt.

9. Prior to executing his plan to beach, Captain Joppich ordered the full engineroom crew to their posts; the presence of all below was unnecessary.

10. From the moment of collision at 9:45 until the decision to beach was announced at 10:02, the Cedarville lost sufficient freeboard as to indicate with certainty that the beach could not be reached.

11. It was the policy of the petitioner, United States Steel Corporation, to repose total authority in its ship Captains for the conduct of each trip; even in the event of collision, the discretion of the Master was unfettered and uninhibited by any order or advice from a superior officer of the corporation despite the ready availability of ship to shore communication for vessels on the Great Lakes.

12. The highest officers of the petitioner in charge of lake shipping were cognizant of the ship's constructional characteristics, were aware immediately that the ship had been in a collision which pierced her hatches, and were informed that Captain Joppich was keeping the full crew on while attempting to beach her.

13. These same corporate officials knew that the Cedarville would sink. According to their own testimony, members of the highest echelon of the petitioner's corporate structure were aware that the wound inflicted by the Topdalsfjord would cause the Cedarville to "sink like a brick."

14. These officials of the corporation, although informed of the seriousness of the collision and aware of the certain failure of the beaching attempt, nevertheless did not intervene to prevent the full consequences of the announced plan of its agent, Captain Joppich.

15. Petitioner failed to provide the ship's Captain with requisite information concerning the buoyancy, stability and trim of the vessel, so that the Captain was not informed of the maneuvering characteristics of the Cedarville.

16. Prior to the execution of Captain Joppich's plan to beach the vessel, he did not calculate:

    1. The distance to the shore.
    2. The rate at which his freeboard was reducing.
    3. The probable speed attainable.
    4. Whether his speed afloat would be retarded by the continuing influx of water, and if so, at what rate deceleration would occur.
    5. The time needed to beach the vessel.

17. Captain Joppich ordered water pumped *into* tanks on the starboard side; his failure to rescind the order, when the list to port had been corrected, resulted in water entering the starboard side at a greater rate than water entering through the gash on the port side. This order of the Captain thus caused the starboard side of the ship to fill faster and ultimately caused the ship to lurch convulsively and capsize to starboard.

18. It was not necessary to keep a full crew in the engine room during the beaching operation; the engines could have been set at any speed and held there automati-

cally. So long as one engineman remained on board to reset the engines if a change in speed became necessary, there was no danger in releasing all the other engineroom personnel from the ship. However, no ship going a maximum of two miles an hour at full speed, without any appreciable freeboard remaining, require the constant attention of an engineer. Under the circumstances prevailing, approaching the final capsize of the ship, there was really no necessity for any engineer remaining on board.

19. The men in the engineroom were never released from their posts.

20. Retention of topside personnel aboard the ship served no useful purpose; as the steadily diminishing freeboard ebbed away, and even Captain Joppich knew that the ship was going down, he did not free his men to permit them a safe entry into the water in lifeboats.

21. No order to abandon ship was ever issued by the Captain, even when her decks were awash.

22. Ten lives were lost.

Conclusions of Law.

1. Maritime law permits the recovery of punitive damages against a maritime tortfeasor whose misconduct evinces a reckless and wanton disregard for the rights of the claimants.

2. The survival action created in 1910 by Congress for railroad employees and their survivors (45 USC § 59), which was extended to seamen and their survivors through the enactment of the Jones Act (46 USC § 688), perpetuates the wrong inflicted upon the de-

ceased seaman to that the action brought by the designated survivors' is the same action which a seaman so mistreated could bring.

3. Under the Jones Act a seaman may sue his employer for, *inter alia,* punitive damages if he has been injured as a direct and proximate result of such conduct on the part of his employer as would show a reckless disregard for the legal rights of the seaman.

4. The concept of punitive damages evolved through the common law and has long been recognized in civil and admiralty courts as a potential element of damage in tort cases. Consequently, there was no necessity for Congress to specify that punitive damages may be recovered under the Jones Act; language of general import is sufficient.

5. The seaman is absolutely bound to follow the orders of the Master of the vessel; there is a correlative duty reposed in the Master and the owner of the vessel to secure the safety and welfare of the crew. Both the Master and the owner acted in callous disregard of their duty to the crew.

6. The petitioner reposed such total authority in Captain Joppich in the operation of the Steamship Cedarville as to raise him to the highest level of corporate power; in this case, the Captain was the alter-ego of the petitioner. While in command of that vessel, he had no higher authority; no officer of the corporation directed or controlled his actions.

7. When the corporate officials in charge of the petitioner's shipping enterprise were informed of the proposed actions of its agent, Captain Joppich, and they realized with certainty the catastrophe which would follow,

there arose a duty to speak out to prevent the full consequence. The failure to speak evinces a conscious acquiescence to the acts of the agent.

8. Acquiescence to the known tortious acts of its agent by the corporate principal is tantamount to a ratification of those acts, making the corporation *particeps criminis* in the unlawful or tortious misconduct of its agent.

9. The acts of Captain Joppich are those of the petitioner, United States Steel Company.

10. Prior to the collision, Captain Joppich exhibited a callous disregard for the safety of all ships and men (including his own) in the following respects:

    a. Travel through a dense fog at full speed in violation of Rule 15.

    b. Deviation from recommended courses in a narrow channel and a dense fog.

    c. Failure to reduce speed and to stop and reverse when he received no signal from the Topdalsfjord, in violation of Rule 26.

    d. Failure to know maneuvering characteristics of the vessel.

11. In ordering the beaching of the vessel, Captain Joppich was guilty of wanton and callous disregard for the safety of his crew in the following respects:

    a. Directing the beaching without first calculating the navigational possibility of beaching.

    b. Resisting the offer of assistance from the Weissenburg.

    c. Failing to release to the lifeboats those men whose presence was not necessary for the dash to the beach.

12. In executing the plan to beach the vessel, Captain Joppich was guilty of a wanton and almost grotesque indifference to the safety of his crew in the following respects:

    a. Failure to clear the engine room of all personnel and setting the engines automatically.

    b. Failure to abandon ship when the hopelessness of the beaching operation became apparent.

    c. Failure to rescind the order to pump water into the starboard tanks.

    d. Failure to release any of his crew when the very decks of the Cedarville were awash.

13. The United States Steel Corporation is liable to the claimants for punitive damages.

The Court hereby expresses its appreciation for the courtesies, cooperation, briefs, etc., of all counsel throughout this case.

The Court will appoint a Commissioner to assess damages herein in the very near future.

(Should any counsel wish to make any suggestions with reference to the mechanics by which such Commissioner should operate, as to time, place, or in any other respect, etc., please advise us not later than two weeks from date of this filing.)

JAMES C. CONNELL,
James C. Connell,
United States District Judge.

Oct. 27, 1967

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18481

UNITED STATES STEEL CORPORATION,
Appellant,

v.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided March 7, 1969.

Before: WEICK, *Chief Judge,* PHILLIPS and PECK, *Circuit Judges.*

PHILLIPS, *Circuit Judge.* In the Straits of Mackinac on May 7, 1965, the Steamship Cedarville, owned by the appellant (United States Steel) and the Norwegian Ship Topdalsfjord collided in a heavy fog. After approximately forty minutes the Cedarville sank, ten of her crewmen were lost and other crew members sustained personal injuries. Subsequently United States Steel filed a petition in the District Court for exoneration from or limitation of liability against the claimants, including the personal repre-

sentatives of the deceased seaman. Similar petitions were filed by the owners of the Topdalsfjord and the Weissenburg, a German ship which was in close proximity to the collision.

After a period of extended pre-trial activity the parties agreed by stipulation that United States Steel and the Norwegian owner would accept liability for the compensatory damages and would pay full compensatory damages to all claimants, either by settlement or by award of a special commissioner. It was further stipulated that punitive damages, if any were found, would be adjudged against United States Steel alone. The unsettled claims for compensatory damages were submitted to a commissioner and the issue of liability for punitive damages was determined by the District Court. Compensatory damages have been settled or are in the process of being awarded completely independent of the appeal now presented to this Court.

After a rather lengthy trial the District Court held that United States Steel was liable to the claimants for punitive damages. The opinion of the District Court is published at 276 F. Supp. 163 (N. D. Ohio). For the reasons herein set forth, we cannot agree with this decision and accordingly reverse the judgment of the District Court.

The only question before the District Court and before this Court is whether or not punitive damages should be assessed against United States Steel as owner of the Cedarville. Reference is made to the published opinion of the District Judge for a detailed statement of facts, which will not be repeated in this opinion except to the extent necessary to dispose of the issues presented on appeal.

United States Steel operated a radio network from its offices in Pittsburgh, Pennsylvania, to all the vessels in its entire fleet on the Great Lakes, known as the Bradley Fleet. Almost immediately after the collision the master of the

Cedarville, Captain Joppich, contacted the Pittsburgh offices by radio advising that a collision had taken place. In turn Captain Parrilla, the manager of the Bradley Fleet, was informed that the Cedarville had been involved in a collision and was seriously holed and taking water. The manager, Captain Parrilla, did not contact the Cedarville by radio.

Immediately after the collision Captain Joppich of the Cedarville sounded a general alarm and sent a May Day. Within a very few minutes he made a decision to beach the vessel rather than abandon ship. This proved to be a disastrous error in judgment, since the ship capsized during its attempted run for the beach and ten crewmen were drowned and others injured.

As one of two major bases for awarding punitive damages the District Court found the failure of the officials of the Bradley Fleet to intervene and countermand the order of Captain Joppich to beach the Cedarville was in callous disregard of the duty of United States Steel to the crewmen. The second major basis for punitive damages was the finding that it was common practice for the officials of the Bradley Fleet to order its ships to proceed at full speed ahead in the fog and to deviate from recommended courses published by the United States Coast Guard for ship traffic in the Straits of Mackinac.

United States Steel argues that the clearly erroneous standard as set out in Rule 52(a) of the Fed. R. Civ. P. is inapplicable where the entire record in the trial court consisted of depositions, the reading of various portions of Coast Guard investigation records and other written evidence and there was no testimony by live witnesses. The reasoning urged in support of this view is that since the trial judge did not see the witnesses testify and observe their demeanor, he is in no better position to judge their

credibility than the reviewing court. It is argued that this Court therefore should not be bound by the clearly erroneous standard in reviewing the findings of fact of the trial judge.

There is authority for this contention. See, e.g., *Kuhn v. Princess Lida of Thurn and Taxis,* 119 F. 2d 704 (3d Cir.) and *Frazier III v. Alabama Motor Club, Inc.,* 349 F. 2d 456 (5th Cir.). Our research reveals a split of authority among Circuits on this point as well as a conflict in some of the earlier decisions of this Court. This Court was faced with an analogous situation in the case of *Commissioner of Internal Revenue v. Spermacet Whaling and Shipping Co.,* 281 F. 2d 646 (6th Cir.), where the conflict among earlier decisions is discussed. The late Judge Shackelford Miller, with the concurrence of Judge O'Sullivan, said at page 651:

> "We recognize that there are a number of decisions in several of the circuits, including our own, which hold that where the subsidiary facts are undisputed and no question of credibility is involved, the Court of Appeals is as well qualified as the trial judge to draw inferences and conclusions therefrom, and such inferences and conclusions of the trial judge can be reviewed by the Court of Appeals free of the limitation of the 'clearly erroneous' rule. Seagrave Corp. v. Mount, 6 Cir., 212 F. 2d 389, 394; E. H. Sheldon & Co. v. Commissioner, 6 Cir., 214 F. 2d 655, 658. However, in Rich v. Pappas, 6 Cir., 229 F. 2d 308, 313, we concluded that in view of the ruling of the Supreme Court in United States v. United States Gypsum Co., supra, 333 U. S. 364, 394, 68 S. Ct. 525, 92 L. Ed. 746, the conclusions of the trial judge even though drawn from undisputed facts, were findings of fact which were not to be set aside unless clearly erroneous. We followed

this new ruling, with one judge dissenting, in Dixie Sand & Gravel Corp. v. Holland, 6 Cir., 255 F. 2d 304, 308, 314, and again in Commissioner of Internal Revenue v. Consolidated Premium Iron Ores, Ltd., supra, 6 Cir., 265 F. 2d 320, 326. However, some members of the Court have been of the opinion that the rule as stated in the earlier Seagrave Corp. and E. H. Sheldon & Co. cases was the correct and better rule and have followed it in recent cases. Yunker v. Commissioner, 6 Cir., 256 F. 2d 130, 133; Gadgel v. Commissioner, 6 Cir., 273 F. 2d 206, 209-210."

In the present case the District Judge conducted a trial extending over a period of approximately four weeks and heard voluminous testimony in the form of depositions, Coast Guard records, and other written material. Upon the basis of this evidence he made findings of fact. We adhere to the conclusion stated by Judge Miller, speaking for the majority in *Spermacet, supra,* and hold that the findings of fact of the District Judge are not to be set aside by this Court unless they are clearly erroneous. We conclude that Rule 52(a) applies to the findings of fact of the District Judge in the present case notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U. S. 278, 291; *United States v. United States Gypsum Co.,* 333 U. S. 364, 395.

In reviewing the record in the present case we accordingly apply the clearly erroneous standard. In *United States v. United States Gypsum Co., supra,* the Supreme Court said:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. at 395.

After a careful review of the record, we hold that the findings of the District Judge to which we have referred above and upon the basis of which the District Court awarded punitive damages against United States Steel are clearly erroneous.

The record fails to disclose evidence to the effect that it was standard procedure for United States Steel to order its vessels to ignore the recommended courses of navigation in this area. Nor do we find support in the record that United States Steel, as a matter of general practice, ordered its ships to proceed full speed ahead in a heavy fog. The only significant evidence in support of these findings are the self-serving statements of Captain Joppich of the Cedarville. There is nothing to indicate that these were authorized procedures dictated by the officials of United States Steel. The isolated action of Captain Joppich does not support a finding that United States Steel knew of this deviation, much less ordered it. We hold that even if the collision would not have occurred except for deviation from Coast Guard recommended compass headings, there is still insufficient support in the record for an award of punitive damages against United States Steel.

The record shows that the Cedarville was a self-unloader and was not constructed with water-tight compartments. Water which entered any one of the compartments would run throughout the entire length of the hull. The evidence indicates that there are many ships on the Great Lakes with similar construction. The District Judge found that with this knowledge of the construction of the Cedarville, Captain Parilla, manager of the Bradley Fleet, knew with certainty that the attempt to beach the ship would fail, once he had learned that the Cedarville was seriously holed and taking water.

It was further found by the District Judge that Captain Parilla learned of the decision to beach the Cedarville prior

to its sinking. Although the record is unclear on this point we cannot say that this finding was clearly erroneous. However, we find no support in the record for the conclusion that Captain Parilla or any other official of United States Steel knew the full extent of the seriousness of the situation or that the beaching attempt was a "certain failure." With wisdom borne of retrospect we now can look back and see that the attempt to beach the vessel was a tragic error in judgment on the part of the master of the Cedarville. We are not prepared to hold, however, that company officials sitting hundreds of miles away had the obligation under the facts of the case to make a decision as to the best course of action to be taken and to countermand the orders of the master who was on the scene and in the middle of the emergency.

The relationship of the ship master and the authority and control he exercises over his ship in such emergencies is unique. In order to avoid chaos aboard in such situations it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority. The master of the vessel must assume authority in such a crisis and he has the responsibility to make the final decision as what the proper course of action must be in view of all the factors concerned. To hold otherwise would result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene. On this very point the Supreme Court in *Columbian Insurance Co. v. Ashby and Stribling*, 38 U. S. 329, 343, speaking through Mr. Justice Story, said:

> "Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and

instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision, without discouraging others by timid doubts or hesitating movements."

The master of the Cedarville chose what he thought was the best course of action under the circumstances for the benefit of all concerned. There is no evidence that he exercised other than good faith when he made his decision to beach the Cedarville. Most of the members of the crew whose lives depended on his decision were his neighbors in Rogers City, Michigan.

The District Court emphasized that another ship, the Weissenburg, was standing by and offered to take aboard the entire crew of the Cedarville. It is entirely feasible that in the strain and crisis of the collision, Captain Joppich thought that a decision to abandon ship and undertake to transfer his men to the Weissenburg would be more dangerous to his crew than an attempt to beach the ship, since he did not know the exact whereabouts of the other ships in the heavy fog in the immediate vicinity. The result of a decision to abandon ship will remain a matter of conjecture. It would have been practically impossible for United States Steel officials sitting in Pittsburgh to have known the situation as well as did Captain Joppich. This is not to say under the same conditions others might not have made a different decision.

In *United Geophysical Co. v. Vela*, 231 F. 2d 816, 819, (5th Cir.) the Court was faced with the problem of reviewing the actions of the master long after the emergency had passed. The reasoning of the Court is particularly applicable in the case before us:

"But navigation in these circumstances is left neither to Judges nor the Elder Brethren of Trinity

House nor those who, in the garb of experts, from the security of a swivel chair now lay out the course with great conviction. 'The master is the commander of the ship—lord of his little world. He is master in every sense of the word * * *'. The Balsa, 3 Cir., 10 F. 2d 408, 409. Whether he has bridge or quarterdeck to stalk, as long as he commands, he is master. It is the Master, then, who must make these decisions and who, clothed with great responsibility, enjoys the greatest and widest of good faith latitude in professional judgment. 'The fundamental principle in navigating a merchantman, whether in times of peace or of war, is that the commanding officer must be left free to exercise his own judgment. Safe navigation denies the proposition that the judgment and sound discretion of a captain of a vessel must be confined in a mental strait-jacket.* * *' The Lusitania, D. C. S. D. N. Y., 251 F. 715, 728."

It may be, as held by the District Court, the Captain Parilla could have offered suggestions by radio to the master of the Cedarville as to what action might have been advisable. However, for Captain Parilla or any other official of United States Steel to have rescinded the master's order to beach the vessel and to have ordered him to abandon ship, without having more knowledge than they possessed at the time, conceivably could have resulted in an even worse disaster. We cannot say that Captain Parilla or other officials of United States Steel should have substituted their judgment for that of the master under the facts of this case. See *The Princess Sophia*, 61 F. 2d 399 (9th Cir.).

We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized

or ratified the acts of the master either before or after the accident. Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him. *Lake Shore and Michigan Southern Railway Co. v. Prentice,* 147 U. S. 101; *The Amiable Nancy,* 16 U. S. (3 Wheat.) 546, 556-57; *Pacific Packing & Navigation Co. v. Fielding,* 136 F. 577 (9th Cir.).

Even if we were to conclude that the actions of Captain Joppich were of such a nature as to warrant an award of punitive damages against him personally, we hold that the facts of this case would not permit this Court to affirm the judgment of the District Court imposing punitive damages upon United States Steel. As has been stated previously, the pre-collision action of Captain Joppich were neither authorized nor ratified by United States Steel. Regarding post-collision events, we hold that the silence of United States Steel and failure to countermand the master's order to beach the vessel did not constitute ratification of his actions. There was no duty for the owner to speak or otherwise interfere with the authority of the master of the vessel under these facts. Furthermore the evidence does not show that Captain Joppich was an unfit master. To the contrary, he was a 54-year old seasoned veteran with many years of experience in navigation on the Great Lakes and through the Straits of Mackinac.

For reasons stated, we hold that the award of punitive damages against United States Steel was error. Our decision will have no effect upon the awarding of compensatory damages to the various claimants.

In view of our disposition of the case we find it unnecessary to decide the other issues raised by the parties on this appeal.

Reversed and remanded.

PECK, *Circuit Judge*, concurring.

I concur with my brethren that the findings upon which the District Court awarded punitive damages against United States Steel Corporation are clearly erroneous, but since we are thus unanimously agreed that the findings do not even reach the level which would require us to permit them to stand under Rule 52(a) it seems to me superfluous to consider whether they could meet less exacting tests. The majority opinion indicates the split of authority existing among Circuits as well as that reflected in some of the decisions of this Court concerning the review of cases in which live witnesses have not been heard and where the trier of the facts considered only the identical documentary record presented to the appellate body. I see no reason to here reaffirm a conclusion indicated but not discussed by a divided court in *Commissioner of Internal Revenue v. Spermacet Whaling and Shipping Co.*, 281 F. 2d 646 (6th Cir. 1960), and would prefer to remain free to consider the issue in a case which does not rise to the clearly erroneous level.

APPENDIX D.

Court's Rulings on Objections and Requests for Modifications to Commissioners' Awards and Opinions Filed May 7, 1969, and Court's Final Orders, Awards, Decrees and Judgments.

(Filed July 8, 1969.)

CONNELL, *J.*

The Court has reviewed in detail the following documents prior to the determination of all the objections filed and modifications requested concerning the Commissioners' Awards and Opinions submitted May 7, 1969.

1. Commissioners' Awards and Opinions, May 7, 1969 (Schroeder/Grogan)

2. Petitioners' objections to Commissioners' Report incorporating petitioners' answer briefs filed with the Commissioners prior to the awards of May 7, 1969 (Keenen/Keig) (filed May 20, 1969)

3. Objections to Commissioners' Report, Awards and Opinions on behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

4. Brief in Support of Objections on Behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Pie-

chan and Stanley P. Mulka (Freedman/Traverse) (filed May 16, 1969)

5. Brief in Opposition to Petitioners' Objections to Commissioners' Report in Behalf of Barbara J. Fuhrman, Administratrix, Marion Jones, Administratrix, Elizabeth Haske, Administratrix, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

6. Petitioners' Response to Objections to Commissioners' Awards Filed on Behalf of Claimants Fuhrman, Haske, Jones, Holley, Idalski, Kierzek, Mulka, Piechan and Przybyla (Keenen/Keig) (note that Tulgetske omitted) (filed May 28, 1969)

7. Brief in Opposition to Objections of Petitioners to Commissioners' Report incorporating the Lamp brief filed with the Commissioner prior to the award of May 7, 1969 (Hanson/Mann) (filed June 5, 1969)

8. Motion to Modify Commissioners' Award in Claim of Alice Marie Lamp (Hanson/Mann) (filed June 5, 1969)

9. Petitioners' brief in Opposition to Claimant's Motion to Modify Commissioners' Award in claim of Alice Marie Lamp (Keenen/Keig).

COURT'S RULINGS.

The Court overrules all objections by all parties to the Commissioners' Awards and Opinions filed May 7, 1969. The Court further denies all modifications in the awards requested by any one or all of the parties. The Court on May 7, 1969, received and accepted the Commissioners' Awards and Opinions. The Court now this 8th

day of July, 1969, promulgates the Commissioners' Awards and Opinions as the Court's Awards and Opinions and enters, as the final orders, decrees, awards, and judgments for all parties, the awards and opinions of the Commissioners dated May 7, 1969. The facts found and the laws applied by the Commissioners in their awards and opinions are accepted as the findings of fact and rules of law of this Court.

COURT'S OPINION.

All documents presented by the parties reveal the highly controversial factual materials presented in these claims. The Court after careful consideration believes that the findings of all facts by the Commissioners, such as the loss of earning capacity, fringe benefits, personal expenses and decedent's share of household expenses, life expectancy and work-life expectancy, pain and suffering, losses based on familial relationships, physical and mental disabilities, maintenance and cure, interest and discount percentages, economic productivity and purchasing power values and all other facts, are reasonable findings of fact by the Commissioners which this Court accepts and promulgates as its findings of facts.

The Court further recognizes these controversial rules of law involved in these claims:

1. No Deduction of Income or other Taxes.

2. Exclusion of Life Insurance and Social Security benefits from any consideration.

3. Granting of pre-judgment interest and *denial of post-judgment interest.*

4. Exclusion of the fact of remarriage by decedent's widow from any consideration.

5. Admission of certain letters, medical and insurance documents.

6. Admission of psychiatric evidence utilizing the words of claimants spoken to the psychiatrist retained as an expert witness.

The Court accepts and promulgates as its rules of law, not only the enumerated issues above but all controverted issues of law, and the Commissioners' determinations on each rule of law in controversy in each of these claims.

JAMES C. CONNELL,
United States District Judge.

Dated July 8, 1969.

APPENDIX E.

Judgment on Decision by the Court.

(Entered July 8, 1969.)

This action came on for trial before the Court, Honorable James C. Connell, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the claimants recover from the above petitioners the following judgments:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased, the sum of $452,084.00;

Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased, the sum of $194,491.00;

Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased, the sum of $338,095.00;

Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, the sum of $308,702.00;

Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased, the sum of $149,414.00;

Jerome F. Kierzek, the sum of $88,860.00;

Stanley P. Mulka, the sum of $92,740.00;

Raphael Przybyla, the sum of $196,288.00;

Ronald G. Piechan, the sum of $82,160.00;

Billy R. Holley, the sum $251,976.00;

Michael John Idalski, the sum of $89,420.00;

Walter Tulgetske, the sum of $195,888.00.

It Is Further Ordered that the costs of the case be assessed against the Petitioners.

Dated at Cleveland, Ohio, this 8th day of July, 1969.

James A. Green,
Clerk of Court.

APPENDIX F.

Opinion.

Nos. 19835-36-37-38-39.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

IN THE MATTER OF: THE PETITION OF UNITED STATES STEEL CORPORATION AND PETITION OF DEN NORSKE AMERIKALINJE A/S OWNER OF THE M/S TOPDALSFJORD, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,

Appellants,

v.

ALICE MARIE LAMP, ADMINISTRATRIX OF THE ESTATE OF DONALD LAMP, DECEASED, ET AL.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed December 23, 1970.

Before: PHILLIPS, *Chief Judge,* and WEICK and PECK, *Circuit Judges.*

PECK, *Circuit Judge*

There are herein considered appeals perfected by two shipowners from judgments entered against them in favor

of twelve injured parties or personal representatives of decedents and cross appeals by the latter groups protesting the alleged inadequacy of those judgments. Appellants will sometimes herein be referred to jointly as "Shipowners" and separately as "United States Steel" and "Den Norske", respectively, and the injured parties and personal representatives of decedents as "Claimants." Claimants are seven seamen and five widows and administratrices of the estate of seamen who were allegedly injured or who lost their lives when the bulk carrier steamship *Cedarville* sunk in the Straits of Mackinac May 7, 1965. All such decedents and surviving claimants were members of the crew of that vessel.

The sinking of the *Cedarville,* owned by United States Steel, followed its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske. The collision occurred in a dense fog, and ten members of the *Cedarville* crew were lost and twenty more sustained injuries which resulted in the filing of claims. Five of the death claims and thirteen of the personal injury claims were settled during earlier stages of these proceedings, and we are here concerned with the remaining five claims of the next of kin of the decedents and of seven personal injury claimants. Petitions for exoneration from or limitation of liability were filed in the District Court [1] immediately following the disaster, followed by the filing of claims by the various claimants. Reference is made to the opinion of the District Court (276 F. Supp. 163) for a detailed statement of the facts [2], which will be restated herein only to the extent required for present purposes. Punitive damages were awarded by the District

1. Den Norske's petition was filed in the District Court for the Northern District of Illinois, Eastern Division, but was subsequently transferred to the Northern District of Ohio, Eastern Division, wherein the United States Steel Petition was originally filed.

2. We are aware of Shipowners' dissatisfaction with that statement, and we do not by this reference adopt it.

Court against United States Steel, which perfected an appeal from such award to this Court. We determined the award of punitive damages to have been error in a decision specifically providing that that determination would have no effect upon the awarding of compensatory damages to the various claimants. *United States Steel Corporation v. Barbara J. Fuhrman, Administratrix,* 407 F. 2d 1143 (1969), *cert. denied,* 398 U. S. 958 (1970).

During the pendency of the punitive damages proceedings and appeal, a stipulation was entered into by counsel for all parties and approved by the Court. Under this stipulation the shipowners' petitions for exoneration and limitation of liability were denied and their claims dismissed with prejudice, and it was further provided that, subject to the right of review and appeal, the disposition of all claims for damages, excluding punitive damages, be determined by a commissioner to be appointed by the District Court. It was further stipulated that hearings concerning compensatory damages should proceed during the pendency of the punitive damage determination, which were to be submitted on stipulated portions of the record. As has been hereinabove indicated, the punitive damage issue has heretofore proceeded to finality.

Pursuant to this stipulation, the District Court appointed two Commissioners to receive the evidence with reference to all of the claims, and they in due course filed their Awards and Opinions for the various claimants. The District Court thereafter received and overruled objections and requests for modifications and accepted the facts found and law applied by the Commissioners in their awards and opinions "as the findings of fact and rules of law of this Court." By separate document of even date judgments in favor of the individual claimants for specified sums were entered and costs were assessed against the Shipowners. The amounts of the judgments are as follows:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased	$452,084.00
Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased	194,491.00
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased	338,095.00
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased	308,702.00
Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased	149,414.00
Jerome K. Kierzek	88,860.00
Stanley P. Mulka	92,740.00
Raphael Przybyla	196,288.00
Ronald G. Piechan	82,160.00
Billy R. Holley	251,976.00
Michael John Idalski	89,420.00
Walter Tulgetske	195,888.00

Before passing to a consideration of the separate items of damages itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case and we therein determined that "Rule 52(a) applied to the findings of fact of the District Judge . . . notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein*, 363 U. S. 278, 291; *United States v. United States Gypsum Co.*, 333 U. S. 364, 395." *United States Steel Corp. v. Fuhrman, Administratrix, supra;* see also *Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co.*, 281 F. 2d 646 (6th Cir. 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination ex-

pressed therein on this point and in *Spermacet* constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its finding to have been "clearly erroneous" under the definition provided by the Supreme Court:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record.

I. PERSONAL INJURY CLAIMS

For their experiences at the time of the sinking, and for their alleged physical and mental disabilities resulting therefrom, the seven personal injury claimants were awarded a total of $997,332. The individual awards ranged from $82,160 to $251,976, and included the following specific elements of damages: loss of earning capacity from the date of the accident to the date of judgment, and for future loss of earning capacity; pain and suffering experienced during the sinking, from the date of the sinking to the date of judgment, and for future pain and suffering; loss of life's pleasures from the date of the sinking to judgment, as well as future loss of life's pleasures; maintenance and cure to the date of judgment; and the cost of future medical services.

Before turning to a discussion of the specific elements of damages awarded to the personal injury claimants, a few comments of a general nature are deemed appropriate.

The first pertains to the nature of the Commissioners' Opinions and Awards themselves. Those Opinions and

Awards, although designated by the Commissioners as their findings of fact and conclusions of law, are entirely unsatisfactory in that respect. Despite the fact that these cases present difficult and complex issues of past and future damages, depending in large part on conflicting medical and psychiatric testimony, the Opinion and Awards for each individual claimant consisted only of a brief review of that testimony together with the claimant's testimony, and concluded with a bare conclusory finding such as:

> "We determine that the claimant Idalski was injured on May 7, 1965 and was damaged thereby."

In each instance a statement of this nature is followed by a listing of the dollar amounts awarded for each of the elements of damages allowed to the individual claimants.

We recognize that this abbreviated aspect of the Commissioners' findings here would not alone be sufficient to require reversal, especially since the findings were concerned with the question of damages rather than liability. Compare *Ginsburg v. Royal Insurance Company*, 179 F. 2d 152, 153 (5th Cir. 1950) with *Matton Oil Transfer Corporation v. The Dynamic*, 123 F. 2d 999, 1000-01 (2d Cir. 1941). But such findings are of little aid to intelligent appellate review. The appellate court is left to presume that the Commissioners accepted the claimants' evidence and based their awards on some combination thereof, but if some of that evidence is found upon review to have been incompetent, the court can only speculate as to the degree to which such evidence influenced the Commissioners.

The next comment is less general in nature, but it pertains to a threshold issue common to each of the personal injury claims. To a very large extent the awards assigned to the various elements of damages were grounded upon the testimony of claimants' psychiatric and orthopedic experts. With particular reference to claimants' psychiatric

expert, shipowners argue that he was a part of a "circle of advocacy" otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.*, In Admiralty, No. 16,994, United States District Court for the Western District of Washington, Northern Division (the *Bunkerhill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *Untied States Steel Corporation v. Fuhrman, Administratrix, supra,* to follow the rule of *Gypsum,* the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess "on the entire evidence . . . a definite and firm conviction that a mistake has been committed," or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence.

Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not actually diametrically opposed to, the opinions which the psychiatric expert was permitted to place in the record. These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a "post-traumatic anxiety neurosis"—resulting from a half hour's immersion in the waters over which they traveled for a livelihood. These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners. In many respects these expert opinions failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter

existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments.

An illustrative example is that of claimant Stanley Mulka. Mulka was sailing for the first time on the trip which culminated in the sinking of the *Cedarville*. Prior to sailing he had attended four years of high school and the first year of college at a Roman Catholic seminary, studying for the priesthood. He then had doubts about continued study for the priesthood, and these doubts apparently caused academic problems. He left college on academic probation early in 1965.

After the sinking Mulka abandoned his short-lived sailing career. He worked the remainder of the summer of 1965 as a plumber's helper and returned to college in the fall of 1965. Upon his return to college, he embarked on a course of study to prepare him to be a school teacher. His grades showed a marked improvement after his return to college, almost all A's and B's and he received an excellent rating as a student teacher. At the time of the hearing below Mulka was set to graduate from college, and he was virtually assured of a position as a teacher. In addition to his participation in normal college social life such as fraternities and special interest clubs, he had a steady girl friend and indicated plans of marriage.

Although Mulka testified that he suffered from constant headaches since the date of the accident and that he also suffered constant, sometimes excruciating, pain in his back, arms and hands since the date of the accident, cross-examination disclosed that he had sought medical attention for headaches prior to the sinking as well as after, but that he had not bothered to seek medical treatment for the "excru-

ciating'' pain in his back, arms or hands since the date of the accident.

Claimants' psychiatrist, testifying solely on the basis of the history and symptoms related to him by Mulka, stated that he found Mulka to have deteriorated emotionally and scholastically after the date of the accident. He diagnosed his condition as a ''moderately severe anxiety neurosis'' which would prevent Mulka from maintaining a job as a school teacher and would disable him to some extent in any occupation he undertook. Cross-examination disclosed to the psychiatrist for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher, and the fact that he had sought medical attention for serious headaches prior to the sinking, but the doctor saw no need to change his diagnosis.

Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum*, on the basis of the entire evidence, we express a definite and firm conviction that a mistake has been committed. However, we do not reject this testimony on this ground alone.

The rules under which doctors (as well as other experts) are permitted, as an exception to the general rule, to express opinions have been carefully formulated. The most important of those rules for present purposes is that a medical opinion based upon the history and subjective symptoms related to a doctor solely for the purpose of enabling him to testify at trial is inadmissible. *Nashville, C. & St. L. Ry. v. York*, 127 F. 2d 606, 611-12 (6th Cir. 1942); *Hardy-Burlingham Mining Co. v. Baker*, 10 F. 2d 277, 281 (6th Cir. 1926); *Baltimore & O. R. R. v. Mangus*, 294 F. 2d 761, 762 (6th Cir. 1924). *See Padgett v. Southern Ry.*, 396 F. 2d 303, 308 (6th 1968). Shipowners contend that since the remarkably similar diagnoses of each claim-

ant's alleged psychiatric disturbance were based solely on the medical history and subjective symptoms related to the psychiatrist by the claimants in order to qualify him to testify in their behalf, that opinion testimony was inadmissible.

Claimants do not challenge the correctness of this rule as it applies generally to the diagnosis of physical complaints, nor do they challenge the shipowners' assertion that the psychiatric diagnosis common to each claimant was based on the history and subjective complaints related to the doctor to qualify him to testify at trial. Rather, they claim an exemption from the general rule, arguing that the diagnosis of psychic disturbances requires the evaluation of the patient's history and subjective complaints. Indeed, claimants contend that the history, subjective symptoms, attitudes and feelings elicited by the psychiatrist from his patient are the only bases for an evaluation and diagnosis of a psychiatric disturbance.

Whatever persuasive effect this argument might have is vitiated by the fact that it finds no support in the record, and certainly the bases for psychiatric diagnosis cannot be judicially noticed. If it is true that psychiatric evaluation must be based in large extent on subjective evidence, the time may come when a separate rule of law will evolve establishing different admissibility standards for opinions as to mental and physical disorders (or the absence thereof). However, if such a distinction is ever to be made, it must be on the basis of evidence justifying a different standard, which in turn must be established by the testimony of experts. No such testimony is contained in the present record,[3] and we will not substitute or lay judgment in this peculiarly nebulous field for evidence.

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3. The only matter in the record remotely touching on this issue are the arguments of counsel at the time the objection to the admission of the psychiatric opinion testimony was made:

Even were we to accept the claimants' argument in this regard, it would meet only one of the reasons underlying the general rule outlined above, that of the objectionable hearsay nature of the doctor's narration of his patient's history and subjective complaints upon which his opinion was based. A separate but related policy for the rule is the exclusion of medical opinion testimony based on what may well be the self-serving declarations of the plaintiff to the examining doctor. See *Padgett v. Southern Ry., supra.* Where the plaintiff consults a doctor solely to qualify him to testify in his behalf at trial, any statements made to the doctor must be highly suspect as a basis for a diagnosis.

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3. (Cont'd.)

"Mr. Keig [Attorney for Den Norske]: Doctor, excuse me. I would like to object to the doctor testifying as to the history he took from this man. The law is clear that examining physicians may not state the history and that their opinion must be based upon evidence otherwise adduced.

"The Commissioner: I think that a history is proper at this time. If he is the treating doctor and saw him on February 25th, 1967, obviously for the purpose of treatment, or as an analyst, or for the purpose of testifying as an expert, I think he can testify as to that.

"Mr. Keig: Mr. Commissioner, that is exactly the point, and you are right. The thing here is he did not see him for treatment, but solely for examination for the purpose of testifying, and that forms the foundation for our objection, because the law is clear that in those cases he may not read his history.

"The Commissioner: Mr. Freedman. [Attorney for Claimants]

"Mr. Freedman: I don't offer the history which he obtained from the client as the truth of those statements. I offer them, as you said before—and this is consistent with the law, too. As a matter of fact, the law is universal on this point, that for the purpose of his making a diagnosis and drawing any kind of a conclusion, he needs to have the history, and to that extent it is very relevant."

Whereupon the objection was overruled and the doctor proceeded to testify as outlined above, diagnosing the psychic disturbances of the claimants on the basis of the history and subjective symptoms related to him by the claimants.

This is particularly true where, as here, the complaint is entirely subjective, the plaintiff has made no attempt to secure treatment for the complaint, and there is at least some divergence between the history and symptoms related to the doctor and those testified to under oath. Accordingly, we hold the psychiatric opinion testimony to have been improperly admitted in this case.

A somewhat different situation exists with respect to medical opinion testimony of physical impairment. Five of the personal injury claims, Holley, Idalski, Piechan, Przybyla and Tulgetske, offered the testimony of an orthopedic expert, who, like the claimants' psychiatric expert, was consulted by claimants solely for the purpose of enabling him to testify in their behalf at the hearing. At the outset of his testimony shipowners renewed their objection to the admission of any expert opinion testimony based upon the history related to the doctor by the claimant. Without explaining their inconsistent rulings, the Commissioners correctly ruled that the orthopedic expert would not be permitted to testify to the history given him by the claimants. In accordance with this ruling the orthopedist then testified to the symptoms observed by him during the examination of each claimant and stated his diagnosis of their various physical ailments based upon such observations. However, despite the ruling immediately prior thereto, with respect to the question of causation of the physical ailments he had diagnosed, the doctor was permitted to state that in his opinion they were caused by "an incident of May 7, 1965."

The admission of this opinion testimony of causation was error. Nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him by the claimants in the course of their examination. As stated above, the opinion of an examining

physician based upon the history related to him by the plaintiff is inadmissible. *Nashville, C & St. L. Ry. v. York, supra; Hardy-Burlingham Mining Co. v. Baker, supra; Baltimore & O. R. R. v. Mangus, supra; Padgett v. Southern Ry. supra.* However, the admission of this testimony was not fatal to the claimant's claims of physical impairment resulting from the sinking. In *Sentiles v. Inter-Caribbean Shipping Co.*, 361 U. S. 107 (1959), the Supreme Court held that the failure of any medical expert to testify that an accident aboard ship was the cause of a seaman's subsequent tubercular condition did not prevent the trier of the fact from inferring that the accident aboard ship was the cause. 361 U. S. at 109. We believe the erroneous admission of the opinion testimony of causation here creates a record in this case similar to that in *Sentiles:* no competent medical evidence of causation but sufficient evidence from which the Commissioners could infer that the physical disabilities diagnosed were caused by the sinking of the *Cedarville.*

In summary, with respect to the expert opinion testimony offered below in support of the claimants' allegations of physical and psychiatric disabilities, we are presented with a record which contains no competent evidence of psychiatric disturbances or disabilities but which does contain competent evidence of physical disabilities along with other evidence from which the Commissioners could properly infer a causal connection with the sinking of the *Cedarville.* It is with these principles in mind that we turn to a discussion of the individual elements of damages awarded by the Commissioners.

a. Pain and Suffering.

The most constant item in the Commissioners' awards is, as it is described therein, "Pain and suffering for the May 7th event." Four of the claimants were awarded $15,000

each for this item, while two (Idalski and Tulgetske) were allowed $10,000 each and one (Holley) was awarded $20,000. As has been indicated above, the Commissioners' Opinions and Awards disclose little of the basis for such awards. Under the general caption "Pain and Suffering" they offer one lengthy but inappropriate quotation from American Law Reports but otherwise give no indication of the guidelines used in making their determination. Moreover, while Holley's situation is clearly distinguishable, it is difficult, if not impossible, to ascertain from the Commissioners' description of the experiences of the individual claimants during the sinking just what formed the basis for distinguishing Idalski's and Tulgetske's situation from those of the other four.[4]

The seven personal injury claimants were variously engaged at the moment of the collision of the *Cedarville* and the *Topdalsfjord*. Some were standing their regular watch; some were sleeping and were awakened by the noise and impact of the collision. However, all of the surviving claimants described the impact as relatively "soft," and none were injured by the impact of the collision itself. There then followed a period of time during which, despite the action of the crew members to halt it, the flow of water into the *Cedarville* rapidly increased. It therefore soon became apparent to the crew members that the *Cedarville* was going to sink and that it must be abandoned. In the resulting rush of events most of the crewmen were either thrown or required to jump into the water. They remained there for periods ranging from a few minutes to thirty to forty minutes before being picked up by their rescuers, but

4. An explanation for this distinction may be found in the fact that, according to the Commissioners' Awards and Opinions, Commissioner Grogan "assumed specific responsibility" for the awards in the Idalski and Tulgetske claims, while Commissioner Schroeder "assumed specific responsibility" for all of the other claims.

while in the water most were able to find their way to a life raft or a life boat within a matter of minutes.

A German ship, the *Weissenburg,* had been following the *Topdalsfjord* at a distance of about one mile, and its captain had "seen" the collision on his radar screen. The *Weissenburg* immediately moved into position to pick up the *Cedarville* crew, and, within the thirty to forty minute time period referred to above, all of the survivors had been taken aboard the *Weissenburg.* They were there given blankets, dry clothes and warm drinks. Soon thereafter they were transferred to the Coast Guard Cutter *Mackinac,* aboard which they went to Mackinac City, Michigan, and thence to Cheboygan, Michigan. With but one exception all of the survivors were taken to the Cheboygan Hospital for examination; Mr. Piechan declined to go to the hospital.

Following examination, none of the claimants were found to require hospitalization, and all were returned to their homes the same afternoon. Claimant Holley, complaining of back pains, returned to the hospital that evening, however. He stayed there one night, underwent further examination, including X-rays, with negative results, and was released by the hospital the following day.

In spite of what can only be regarded as deficiencies in the disclosure of the basis for the Commissioners' Opinions and Awards, the awards to the individual claimants might be sustained on the basis of their individual testimony describing their personal experiences at the time of the sinking except for two factors. First, we regard the awards for pain and suffering on the occasion of the sinking as excessive. Second, we are clearly unable to conclude that the inadmissible but colorful testimony of the highly articulate psychiatric expert was not persuasive with the Commissioners. We thus have no alternative but to vacate these awards and to remand them for reevaluation and further

findings on the basis of the present record exclusive of the incompetent psychiatric testimony.

Intervening chronologically between the pain and suffering items "For the May 7th event" and those for the future are the pain and suffering damages allowed for the four-year period from the sinking to the date of the District Court judgment, May 7, 1969. An award in the sum of $10,000 (on the basis of $2,500 per year) was allowed on this account to each of the claimants except for Idalski, who received a $12,000 award (on a $3,000 per year basis).

As in the case of the pain and suffering allowance "For the May 7th event", the Commissioners' Awards and Opinions set forth no satisfactory basis for the determination of these interim period awards (except that again Holley's situation is distinguishable and in Idalski's case, perhaps to justify the higher award made to him, passing mention is made of pains in the left leg, shoulder, shin and elbow area). However, also as in the case of the "For the May 7th event" awards, the fact remains that although there is some evidence in the record as to the claimants' discomfort for a past period, we conclude the amount of the awards to be excessive, and we are unable to say that the inadmissible testimony of the psychiatric expert was not a factor in the determination thereof. Thus these awards must also be vacated and remanded for further findings and reevaluation without such testimony.

The awards for future pain and suffering, which ranged from $5,000 to Mulka (50 years, his life expectancy, at $100 per year) to $35,200 to Tulgetske (10 years at $2,000 per year and 15.2 years at $1,000 per year, for a life expectancy of 25.2 years), present a similar picture. While the basis of the Commissioners' awards for pain and suffering experienced during the events surrounding the sinking and until the date of judgment is less than satisfactory, the

direct evidence from the claimants themselves provides some support for the awards. An award of damages for future pain and suffering cannot rest solely on the evidence of past pain and suffering, however. Competent medical testimony showing both diagnosis and prognosis is necessary before the trier of fact can reasonably find that pain and suffering will continue into the future.

As indicated above, all of the claimants here offered expert psychiatric testimony in support of their alleged future pain and suffering, and all but two of the claimants (Mulka and Kierzek) offered expert orthopedic testimony as additional support. Since we have already held, however, that the expert psychiatric testimony was improperly admitted into evidence and can provide no basis for any of the awards, to the extent that any award was based on such expert psychiatric testimony, it must fail. Accordingly, the awards to Mulka and Kierzek, being based solely on the incompetent psychiatric testimony, must fail completely. The awards to the other five claimants must fail in part also since it is clear that they were based in part on the incompetent psychiatric testimony. However, since, as has also been stated, it is impossible to discern from the Commissioners' Opinions and Awards the extent to which those awards were grounded upon the incompetent evidence, we again refuse to substitute our judgment for that of the Commissioners and instead vacate the awards and remand for further findings and reevaluation solely on the basis of the evidence here held to be competent.

b. Loss of Life's Pleasures.

The next category of awards, those for loss of life's pleasures, is closely related to the awards for pain and suffering in that evidence offered to support a claim for loss of life's pleasures generally parallels that required to

support a claim for pain and suffering. Awards in this category have on occasion been made by courts to claimants who, by reason of their injury, are deprived of the opportunity to participate in the normal activities, social, athletic or recreational, in which a person without such injury could engage. *See e.g., Hanson v. Reiss Steamship Company,* 184 F. Supp. 545 (D. Del. 1960); *Vastano v. Partownership Brovigtank,* 158 F. Supp. 477 (E. D. N. Y. 1957); *Yates v. Dann,* 124 F. Supp. 125 (D. Del. 1954).

The Commissioners made awards in this category to each of the personal injury claimants ranking from $3,500 (to Mulka) to $65,200 (to Tulgetske). Here again the awards present the recurrent problem hampering appropriate appellate review in this case—the virtual absence of any indication from the Commissioners of their basis for the awards. To some extent the awards may have been based on the testimony of the claimants as to their inability to engage in certain activities since the date of the accident, but a study of the record precludes any conclusion but that the awards were also based in large part upon the diagnosis offered by claimants' pychiatric expert as to each claimant of a post-traumatic anxiety neurosis.

An illustrative example is that of claimant Jerome Kierzek. The only item in his testimony remotely connected to any impairment of his ability to enjoy the pleasures of life was his own testimony on direct examination that, following the sinking of the *Cedarville,* he acquired a fear of sailing which caused him to engage in heavy drinking. While it is doubtful that such testimony could be considered a proper basis for an award, even that basis is destroyed by his own testimony on cross-examination, which established that his drinking subsided shortly after his marriage a few months after the sinking. The remainder of his testimony provides no support for finding any reduction in any

of his activities, social or recreational, or any domestic difficulties which could in any way be related to the sinking. To the contrary, Kierzek's testimony showed, among other things, that he loved his wife and child, that he got along well with them, that he enjoyed going out socially with his wife (although his opportunity to do so was severely limited during his two years overseas duty in the U. S. Army), and that he had received five promotions during the course of his two year tour of army duty. Moreover, as stated above, Kierzek offered no expert medical opinion testimony of any physical disability caused by the sinking which would impair his ability to engage in the normal activities of a man of his age and situation. The only testimony in the record which even approximates a basis for the Commissioners' award to Kierzek for loss of life's pleasures appears in the incompetent as well as incredible testimony of the claimants' psychiatric expert:

> "Q. Will [this anxiety neurosis] affect his life's pleasures? A. Yes, sir.
>
> "Q. In what respect? A. In that certainly, he cannot have the usual, normal pursuit of happiness that all of us, I believe, are entitled to.
>
> "Mr. Keig: I would like to strike that conclusory statement. There is not one factual thing in that.
>
> "The Commissioner: I was listening for something factual, too.
>
> "Maybe he could give something factual as to how he is going to be denied life's pleasures.
>
> "Q. Will you answer that question, Doctor? A. Yes, sir. I don't believe that he would get the pleasure out of being with people that other people do. I don't believe that he is able to enjoy the pleasures of, say, going to a movie, bowling, organizations that many

men are accustomed to. I believe that he will not be as happy in his marriage as he would be without his anxiety neurosis."

As with the awards for pain and suffering, without the incompetent psychiatric opinion testimony as support, the awards for loss of life's pleasures are so grossly excessive as to be clearly erroneous. To the extent that any of the awards for loss of life's pleasures were based on the psychiatric testimony hereinabove held inadmissible, the awards must fail. A determination, however, of the validity of the awards in this group other than that to Kierzek requires a sifting and weighing of the evidence, a function more suited to the fact finder than to this court. Accordingly, we again vacate and remand for further findings and reevaluation, on the basis of the present record exclusive of the incompetent psychiatric testimony, the awards for loss of life's pleasures to each of the personal injury claimants other than Kierzek. We hold that the award to him on this account is not supported by the record as a matter of law.

c. Loss of Earning Capacity.

Two items of damages allowed to each of the personal injury claimants were for loss of earning capacity for the four year period from incident to judgment, and for the future, respectively. The awards made for the four year period may first be summarily disallowed. The Commissioners preface their determination of these awards with the abstruse statement, "The loss of earning capacity of the surviving seamen is measured by reasonable probability based upon evidence which permits the decision-maker to arrive at a pecuniary value of the loss." They then offer a resume of principles suggested as available for guidance

in the determination of such loss, but like the quoted statement, they are without present application because the record is utterly void of evidence which would thereunder justify an award to any of the present claimants. While this further circumstance would not necessarily be fatal to the claims, the fact is that the record establishes that with the exception of Mulka who returned to college shortly after the sinking and Kierzek who entered the Army in March 1966, both of which circumstances were unrelated to the sinking, each of the claimants who compensated on a higher basis during the four year period than that under which he had been receiving compensation either immediately prior to the sinking or for the four-year period immediately prior thereto. The formula for determining the amount of an award for loss of earning capacity in this Circuit was enunciated in *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4, 11 (6th Cir. 1956):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and *the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.*" (Emphasis supplied.)

The Commissioners, and thus the District Court which adopted their conclusions without independent elaboration, simply ignore this teaching of *Drlik* without reference thereto. Similarly, although the application of *Drlik* is argued in shipowners' main brief, the answering brief of the personal injury claimants (and of three of the death

claimants) makes only a passing comment to another aspect of *Drlik*.[5]

However we express reservations concerning the averaging out period used in *Drlik*. During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years. For such use as it may be in the remand hereinafter directed, we therefore express the view that the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it, unless the tortfeasor sustains the burden of showing that the single year was high for abnormal reasons. It was for that reason that we earlier observed that these claimants had not shown a decrease in earning capacity for the four year period following the sinking when compared either to earnings immediately prior thereto or to the average of the four pre-

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5. One brief filed in connection with one of the death claims inferentially attempts to discredit *Drlik* by arguing that it adopted the rule from two Second Circuit cases (*Porello v. U. S.*, 153 F. 2d 605 (1946) and *Carroll v. U. S.*, 133 F. 2d 690 (1943)), and then contending that these cases were subsequently overruled by *LeRoy v. Sabena Belgian World Airlines*, 344 F. 2d 266 (2d Cir. 1965). However, *LeRoy* is distinguishable on its facts and is entirely without present application. It is further argued that *Petition of Marina Mercante Nicaraguense, S. A.*, 248 F. Supp. 15 (S. D. N. Y., 1965), modified 364 F. 2d 118 (2d Cir. 1966). (*The El Salvador*) reaffirmed the Second Circuit's rejection of *Drlik's* "averaging out" theory, but *The El Salvador* used the year prior to death as the base for awards, noting that these earnings were "consistent with . . . previous earning record[s]", and its conclusions are in no way inconsistent with those reached herein. The next year the Second Circuit in *Candiano v. Moore-McCormack Lines, Inc.*, 382 F. 2d 961 (2d Cir. 1967), affirming the decision reported at 251 F. Supp. 654 (S. D. N. Y. 1966) approved the establishment of a claimant's earning capacity by averaging his earnings for the six years preceding the accident.

vious years,[6] and we restate the disallowance of those awards.

The problems faced in connection with future earning capacity are considerably more difficult than those involved in a consideration of earning capacity for a concluded period, as in this case the four years from incident to judgment. Where a past period is involved, in the absence of an affirmative showing to the contrary, the best evidence of earning capacity is the individual's actual earning record. As to the future, the same general principle of comparison of the claimant's earning capacity with and without injury applies. As the Second Circuit has stated:

> "The objective is to place the [claimant] in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what [claimant's] annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by [claimant's] [work life] expectancy, and discounting the product to present value." *Conte v. Flota Mercante Del Estado,* 277 F. 2d 664, 669 (2d Cir. 1960).

While the general formula is easily stated, its application in the evaluation of future earning capacity is less easy. However, again some principles of general application can be stated. The claimant must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of claimant's earnings history, taking into account all avail-

6. In *Drlik,* to determine lost earning capacity this Court used as a base the average of the plaintiff's earnings for the four year period immediately prior to the accident.

le data relevant to wage adjustment. Next the claimant ıst establish the reduction, if any, in his earning capacity oximately resulting from the injury by showing the exist-ce of some condition which demonstrably limits his op-rtunities for gainful activity. See e.g., *Wiles v. New ork, C. & St. L. R. R.*, 283 F. 2d 328, 331 (3rd Cir. 1960); *nte v. Flota Mercante Del Estado, supra.* We gravely ubt that any such loss can be demonstrated from the cord as to any of the present claimants, with the possible ception of Tulgetske and Holley, but once again it is im-ssible to tell from their Awards and Opinions what ctual considerations motivated the Commissioners in this gard, and to what extent the emphatically articulated but admissible testimony of the psychiatric expert was per-asive. For this reason the awards made to all of the rvivors for loss of future earnings will be vacated and manded for further findings and reevaluation by the ommissioners.

Maintenance and Cure.

Awards for maintenance and cure to the date of judg-ent were made by the Commissioners to four of the per-onal injury claimants: Holley, Idalski, Przybyla and ulgetske. The awards were calculated at the claimants' ontractual rate of $8.00 per day for the 1461 days inter-ening between the date of the sinking and the date of judg-ent, less any days for which maintenance and cure had lready been paid. Thus the award to each claimant was n excess of $11,000.

The principles of law governing an award for main-enance and cure are well settled. The law imposes a duty pon the master and owner of a vessel to provide his sea-nen with food and lodging if they should become sick or

injured while in the ship's service. The duty begins with the inception of the disabling sickness or injury and continues until the seaman reaches maximum medical recovery. *Vaughan v. Atkinson*, 369 U. S. 527, 531 (1962). Presumably such time would normally be when the seaman voluntarily returns to work. The duty of the shipowner extends beyond the termination of the voyage, *Calmar S. S. Corporation v. Taylor*, 303 U. S. 525, 528 (1938), and it is not necessarily terminated by the seaman's resumption of some gainful employment if the shipowner has in effect forced the seaman to return to work by willfully ignoring his claim for medical attention. *Vaughan v. Atkinson, supra.*

Under the facts of this case we must conclude the awards to have been improper. As with so many of the other awards for the various elements of damage, it is once again difficult, if not impossible, to determine from the Commissioners' Opinions and Awards their basis for granting maintenance and cure. The itemization of the amounts awarded to the four claimants merely contains a cryptic notation such as:

> "He has not reached maximum medical recovery and is entitled to maintenance and cure at $8.00 per day for 1461 days."

The record suggests that, at least insofar as some of the claimants are concerned, the award was based on the testimony of claimants' expert psychiatrist who stated that the claimant was in need of psychiatric treatment from the date of the accident to the date of the hearing. Of course, to the extent any of the awards for maintenance and cure were based on the psychiatric opinion testimony, which we have hereinabove held incompetent, they must fail. The validity of the awards need not rest on whether they were based

on the incompetent psychiatric testimony, however, because there is no objective evidence that any of the claimants resumed gainful employment for reasons other than their voluntary determination to do so, nor is there any evidence that any of the claimants made any request for medical attention which was wilfully ignored by United States Steel.

> "A seaman by voluntarily working rather than using maintenance and cure to speed his recovery cannot by those tactics enhance the liability of the shipowner any more than the shipowner can be permitted to minimize his liability by refusing to pay and forcing the seaman back to work." *Pyles v. American Trading and Production Corporation,* 372 F. 2d 611, 619 (5th Cir. 1967).

Accordingly the awards to Holley, Idalski, Przybyla and Tulgetske for maintenance and cure to the date of judgment are vacated.

e. Future Medical Services.

Under the heading "Cost of Medical Services" the Commissioners awarded to each of the seven personal injury claimants amounts ranging from $1,560 (to Kierzek) to $15,600 (to Przybyla and Holley) for the stated purpose of permitting the claimants to receive weekly or bi-weekly psychiatric treatment at the rate of $30 per treatment, for periods ranging from two to five years.[7] Unlike most of the other awards, the basis for the Commissioners' awards

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7. The award to Kierzek was an exception to the other awards. His award for future medical services was for the purpose of enabling him to pay weekly visits to a general practitioner rather than seeking psychiatric treatment because of his stated fear of psychiatrists.

for the cost of future medical services is clear. The award to each personal injury claimant was based upon the statement of claimants' psychiatrist that the individual claimant was in need of psychiatric treatment for the period of time for which the award was made. Accordingly, in light of our holding herein that the testimony of claimants' psychiatric expert was incompetent and improperly admitted into evidence, the awards for future medical services, being based upon that testimony, must be vacated.

f. Recapitulation as to Personal Injury Claims.

As had been determined in detail above, certain items included in the judgments entered on account of the personal injuries alleged have been determined to have been erroneously included as a matter of law. Items falling in this category are the losses of earning capacity attributed to each of the seven claimants for the four year period from the date of the sinking to that of judgment, maintenance and cure allowed four claimants (Pryzbyla, Holley, Idalski and Tulgetske) for the four year period, future medical expenses allowed to all seven claimants, loss of future earning capacity allowed to one claimant (Mulka), and for the alleged loss of life's pleasures to one claimant (Kierzek). On the remand hereinafter ordered the District Court is instructed not to allow damages on account of any of these items. On such remand the District Court is further instructed to make further findings and reevaluate every other allowance included in the judgments entered in favor of the various claimants, each of which allowances is specifically disapproved for the reasons hereinabove set forth. Such further findings and reevaluation shall be made on the basis only of the evidence herein held to have been properly received and in accordance with the principles herein enunciated.

II. DEATH CLAIMS.

The death claims present somewhat different issues than those which were presented in connection with the personal injury claims. With few exceptions there is no dispute about the personal representatives' entitlement to the various elements of damage necessary to compensate them for the "deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." *Cleveland Tankers, Inc. v. Tierney,* 169 F. 2d 622, 625 (6th Cir. 1948). Rather, the principal issues in the death cases turn upon the appropriate method of computation of those elements of damage in order to most accurately reflect the true value of the pecuniary loss to the decedents' families. The exceptions concern the awards against both United States Steel and Den Norske for pain and suffering undergone by the decedents in connection with the circumstances of their deaths and for the loss of care and guidance to the widows, and the award applicable only against Den Norske for loss of consortium and loss of care and guidance to the adult children under the Michigan Wrongful Death Act. These issues will be separately discussed.

a. Loss of Earning Capacity.

The primary element of pecuniary loss to the families of the deceased seamen is, of course, the loss of the decedent's earning capacity, both for the interim period between the date of death and the date of judgment and for the remainder of the decedent's work-life expectancy. The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived, but earning capacity may also include the value of

those fringe benefits which would inure to the benefit of the decedent's family had he lived.

In determining earning capacity loss from the date of death to the date of judgment, the Commissioners first appropriately looked to the decedents' actual earnings prior to death and selected as a base the highest of each decedent's annual earnings for the five years prior to his death. That base figure was then increased by 4% to 5% per year for each of the four years between the date of death and the date of judgment, such increases representing the Commissioners' views of the annual wage rate increases which the decedents would have received in each of the years from 1965 to 1969. The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits, and from the total of such lost wages and fringe benefits the Commissioners deducted a percentage ranging from 10% to 30%, representing the decedent's personal consumption of such earning capacity.

The Commissioners' computation of future earning capacity loss was similar in many respects to the computation of such loss for the four year period. The earnings base selected by the Commissioners represented an approximation of their prior estimate of each decedent's earnings for the year of judgment, i.e., 1969. That base was then multiplied by the decedent's work-life expectancy, with deductions for the decedent's personal consumption, and to the total thus reached, the fringe benefit factor of 15% to 40% was added. A percentage of 2% to 4% of that total was then added as representing "personal productivity improvement and general economic growth."

Issues are raised here concerning almost every step in the Commissioners' computations of earning capacity loss. Shipowners contend that the earnings base selected

by the Commissioners for both the four year period and for the future was too high, that the Commissioners erred in assuming that the decedents would have received a wage rate increase of 4% to 5% for each year during the four year period and that the factors added in for fringe benefits and for "personal productivity and general economic growth" were excessive. Shipowners also contend that the Commissioners erred in failing to make an adjustment to the awards for earning capacity losses for the value of social security and life insurance benefits payable upon the deaths of the decedents and by failing to make an adjustment for the impact of future income taxes upon such earning capacity. On the other hand, claimants contend that the deductions from the estimated lost earnings for the decedents' personal consumption was grossly excessive and that the Commissioners erred in computing the awards on the basis of work-life expectancy rather than full life expectancy, arguing that the decedents would have worked for the remainder of their full life expectancy.

Turning first to the question of whether the Commissioners erred in refusing to make an adjustment of their determination of earning capacity loss for the impact of social security and insurance benefits, as well as future income taxes, we hold that there was no error in the refusal to make those adjustments.

Social security and insurance benefits payable to the widows and minor children surviving the decedents, even though paid for in part by the decedents' employer, do not represent partial payment of the shipowners' liability for the loss to the families of the decedents' earning capacities. Rather, they represent receipt of private or governmental contract rights which became fully executed and payable upon death without regard to the cause of death, and contrary to shipowners' assertion refusal to allow an "offset"

for such benefits does not require them to pay twice for the same loss. *See United States v. Harue Hayashi*, 282 F. 2d 599 (9th Cir. 1960). Shipowners' primary basis for their argument in favor of the adjustment is that the receipt of the social security and insurance benefits reduces the pecuniary loss to the survivors occasioned by reason of the deaths. Relying on the general principle of *Cleveland Tankers, Inc. v. Tierney, supra,* they contend that they are liable only for the pecuniary loss to the deceased seamen's surviving families. However, upon such reasoning any reduction in the pecuniary loss to the widows or children occasioned, for example, by a widow's remarriage or entry into the labor market, could likewise be justified. As the Commissioners concluded, such benefits are irrelevant to the measure of the earning capacity loss suffered by reason of the seamen's deaths for which the shipowners are liable.

The question of whether an adjustment for the impact of income taxes upon the award for loss of earning capacity should be made presents separate issues. Obviously, the earnings which the decedents would have received in the future had they lived, which is the theoretical basis for the award, would have had federal and other income taxes deducted, and an initially plausible argument can be made that the true reflection of future earning capacity loss must be preceded by an adjustment to the award for such taxes. However, we do not find that argument persuasive because the impact of such future taxes can not be predicted with reasonable certainty. The infinite variations of exemptions and deductions coupled with the possibility of changes in the tax structure which could occur over the span of a decedent's life expectancy could materially alter the impact of the income tax, and any adjustment for income tax either with or without

consideration of the possibilities for variation must constitute mere speculation on the part of the trier of fact. *See McWeeney v. New York, N. H. & H. R. R.*, 282 F. 2d 34 (2d Cir.), *cert. denied*, 364 U. S. 870 (1960); *cf. Sleeman v. Chesapeake & Ohio R. R.*, 414 F. 2d 305 (6th Cir. 1969). We therefore adopt the rule that no adjustment for income tax need be made "at the lower or middle reach of the income scale." *McWeeney v. New York, N. H. & H. R. R., supra; Petition of Marina Mercante Nicaraguense, S. A.*, 364 F. 2d 118 (2d Cir.), *cert. denied*, 385 U. S. 1005 (1967) (*The El Salvador*). We further hold that each of the anticipated future individual incomes involved in this case fall within that range and that the Commissioners' refusal to make an adjustment for income taxes did not constitute error.

We turn next to a consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15 to 40 percent. As in other instances, shipowners do not dispute the propriety of an award for fringe benefits. Rather they dispute the size of the awards and the Commissioners' failure to specify and evaluate each individual benefit included in the total. However, the record shows that both the shipowners and the claimants submitted extensive evaluations of each of the fringe benefits which would have been received by the decedents had they lived. The mere fact that the Commissioners converted the parties' evaluations of the benefits to percentages of the decedents' estimated lost wages for purposes of computation does not render the Commissioners' awards subject to attack for lack of specificity. Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the range suggested by

the parties' own evaluations.[8] While we might not have proceeded in the same manner had the initial decision been ours, both the percentages and the method of computation chosen by the Commissioners find support in the record, and it cannot be said that they are clearly erroneous.

Lastly we turn to the first element of the Commissioners' computation of earning capacity loss, i.e., the earnings base upon which such computations were made. As stated above, the Commissioners chose as their initial base for computation each decedent's highest annual earnings for the five year period prior to his death. As we have hereinabove indicated in connection with the personal injury claims, however, the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it. We believe the Commissioners' selection of the highest of the decedent's annual earnings for the five years prior to death to have been clearly erroneous. Moreover, after having so selected the initial earnings base, the Commissioners assumed each decedent's gross earnings would have increased by 4% to 5% per year for each year from the year of death to the year of judgment. The only apparent basis for such assumption on the part of the Commissioners was the testimony of expert actuaries and economists which tended generally to show that all wages tend to increase from 5% to 6% annually as the result of increased productivity and in-

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	Claimant's Percentage of Fringe Benefits to Earnings Loss	*Defendants' Percentage of Fringe Benefits to Earnings Loss*	*Commissioners' Percentage of Fringe Benefits to Earnings Loss*
Lamp	22%	19%	20%
Cook	20%	20%	20%
Fuhrman	16%	11%	15%
Haske	22%	10%	15%
Jones	62%	32%	40%

flation. However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived. Those agreements showed that the annual wage increase which the hourly employees would have been entitled to receive in the four years from date of death to the date of judgment approximated 1½% per annum, not the 4% to 5% per annum increase found by the Commissioners. Accordingly we hold that the earnings bases for the determination of earning capacity loss for both the four year period and for the future found by the Commissioners to have been clearly erroneous. In all other respects we find no error in the Commissioners' method of computation of earning capacity loss. The awards for earning capacity losses for both the four year period and for the future will be vacated and remanded for reevaluation in accordance with the foregoing.

b. Pain and Suffering.

As in the personal injury cases, the most constant item in the Commissioners' awards in the death cases was the award of $5,000 to each claimant for the pain and suffering undergone by each decedent prior to his death. Unlike the pain and suffering awards in the personal injury cases, however, the awards here present relatively uncomplicated issues upon review.

We note first that an award for pain and suffering is a proper element of damages in a Jones Act action for the recovery of the pecuniary loss resulting from the death of a seaman where it can be shown that the decedent experienced such suffering before his death. *St. Louis, I. M. & S. R. Ry. v. Craft*, 237 U. S. 648 (1915); *Cleveland Tankers, Inc. v. Tierney, supra* at 626. Therefore, the issue for our determination is whether there was any evidence from which

the Commissioners could reasonably find that the decedents experienced pain and suffering in connection with their deaths.

Shipowners do not dispute the propriety of an award for pain and suffering, but they vigorously contend that no award for pain and suffering was justified in any of the death cases here because there was no evidence of any of the circumstances surrounding the deaths of the crewmen, much less any affirmative evidence that those crewmen experienced pain and suffering at that time. We disagree. An eyewitness account of the circumstances of the deaths is not essential to such an award. Such evidence does, however, establish that some of the decedents were last observed performing their assigned duties below deck after the collision between the *Cedarville* and the *Topdalsfjord*. During this period of time the *Cedarville* was rapidly taking on water despite the efforts of the crew to halt it, thus permitting the inference that these decedents met their deaths by drowning in those inrushing waters while engaging in an unsuccessful struggle to save the ship. Moreover, it must be remembered that the survivors described the impact of the *Cedarville* and the *Topdalsfjord* as relatively "soft", thus permitting the further inference that it was unlikely that any of the decedents would have been rendered unconscious prior to their final moments. Other decedents were last observed on the deck or in lifeboats but presumably were hurled into the water as the ship capsized and sank. These circumstances, too, give rise to the almost inescapable inference that those crewmen died by drowning, and nothing in those circumstances suggests that they were rendered unaware of their fate. Under such circumstances, an award for pain and suffering cannot be said to be error. *See Grantham v. Quinn Menhaden Fisheries, Inc.*, 344 F. 2d 590 (4th Cir. 1965); *Petition of Marina Mer-*

cante Nicaraguense, S. A., supra, 248 F. Supp. 15, 28 (S. D. N. Y. 1965) (*The El Salvador*); *Meehan v. Central R. R.,* 181 F. Supp. 594, 625-26 (S. D. N. Y. 1960).

Having thus determined that there was sufficient evidence from which the Commissioners could find that the decedents experienced pain and suffering prior to their deaths, our review with respect to this issue is closed. Despite claimants' assertion that the awards of $5,000 were adequate in light of the "excruciating and agonizing suffering that decedents experienced" and shipowners' implicit argument that the amount was excessive, we will not attempt to substitute our judgment for that of the Commissioners. The awards for pain and suffering in the death cases will not be disturbed.

c. Loss of Consortium and Loss of Counsel and Guidance to the Widows and Loss of Love, Companionship and Guidance to the Adult Emancipated Children.

In the course of their determinations in the death cases, the Commissioners awarded sums to the widows of the deceased seamen for the loss of their husband's counsel and guidance and also for their loss of consortium, and sums to the adult emancipated children for the value of the love, companionship and guidance which those children would have received from their decedent. The propriety of these awards is the basic issue common to all.

As has been noted elsewhere, the jurisdictional basis for the death claims against the defendant United States Steel was the Jones Act, 46 U. S. C. § 688 (and by incorporation, the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq.) because the deceased crewmen were employees of United States Steel. The basis for corresponding claims against defendant Den Norske was the general maritime law as supplemented by the Michigan Wrongful Death Act (M. C. L. A. § 600.2922), because of the absence of any

employer-employee relationship between the decedents and Den Norske and the occurrence of the accident within the territorial waters of the State of Michigan. Under those statutes the liability of both defendants is limited to the pecuniary loss occasioned by the death of the family head, and the issue presented with respect to each of the above named items for which the Commissioners made awards is whether those items can properly be considered elements of pecuniary loss arising out of the decedents' deaths.

More specifically, the issue with respect to the awards for loss of counsel and guidance to the widows is whether loss of counsel and guidance is a proper element of pecuniary loss in a Jones Act action for damages by an administratrix of a deceased seaman.

The touchstone for any consideration of the propriety of an award in a Jones Act case for the loss of a decedent's counsel, care and guidance is *Michigan Central R. R. v. Vreeland*, 227 U. S. 59 (1913). In that case, an action under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq., to recover damages for the wrongful death of a railroad employee, the Supreme Court held that the trial court committed prejudicial error in permitting the jury to consider and award damages to the decedent's widow for the loss of the care and advice of her husband. After reiterating the rule that damages in an FELA action, as in a Jones Act action, are limited to the pecuniary loss incurred by reason of the decedent's death, the Court stated in relation to the charge therein that it "threw the door open to the wildest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." 227 U. S. at 73. Since the Supreme Court's decision in *Michigan Central*, no case arising under the Jones Act to which we have been referred by the parties or which has

been disclosed by our own research has permitted an award for the loss to the widow of the decedent's care and guidance. *See e.g., Petition of Marina Mercante Nicaraguense, S. A.*, 248 F. Supp. 15 (S. D. N. Y. 1965), *modified* 364 F. 2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation*, 204 F. Supp. 727 (S. D. N. Y. 1960); *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S. D. N. Y. 1960), *modified sub nom., Moore-McCormack Lines, Inc. v. Richardson*, 295 F. 2d 583 (2d Cir. 1961).

Notwithstanding the paucity of authority to support such an award, the claimants and the Commissioners seize upon certain language in *Michigan Central* to justify the awards, as follows:

> "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice." 227 U. S. at 74.

Claimants contend that here there were allegations and evidence of loss of care and advice and that the awards should therefore be permitted to stand. We disagree. The entire thrust of *Michigan Central* is that the pecuniary loss standard of FELA and Jones Act cases requires specific evidence of both the nature of the services lost and the cost of obtaining such services elsewhere. The Court stated:

> "[T]he word[s] [pecuniary loss] as judicially adopted [are] not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel,

> training and education which it might, under the evidence, have reasonably received from the parent, *and which can only be supplied by the service of another for compensation.*" 227 U. S. at 71. (Emphasis supplied.)

The Court further stated:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physical training, *such as when obtained from others must be for financial compensation.*" 227 U. S. at 73. (Emphasis supplied.)

We believe these excerpts must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could "only be supplied by the service of another for compensation," much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. *Cf. First National Bank of Greenwich v. National Airlines, Inc.*, 288 F. 2d 621 (2d Cir.), cert. denied, 368 U. S. 589 (1961); *Meehan v. Central R. R.*, 181 F. Supp. 594 (S. D. N. Y. 1960).

The precise issue with respect to the Commissioners' awards for loss of consortium to the widows and for loss of

love, companionship and guidance to the adult children, applied only against defendant Den Norske under the Michigan Wrongful Death Act, is whether the definition of pecuniary loss is to be governed by the principles of the general maritime law or by Michigan law interpreting that state's wrongful death statute. If the principles of general maritime law control, the awards for loss of consortium to the widows were improper because the general maritime law does not recognize that item as an element of pecuniary loss. *Igneri v. Cie de Transports Oceaniques,* 323 F. 2d 257 (2d Cir.), *cert. denied,* 376 U. S. 949 (1964); *Simpson v. Knut Knutsen, O. A. S.,* 296 F. Supp. 1308 (N. D. Cal. 1969); *Valitutto v. D/S I/D Garonne,* 295 F. Supp. 764 (S. D. N. Y. 1969). But Michigan courts construing that state's wrongful death statute have permitted awards to widows for loss of consortium (e.g., *Montgomery v. Stephan,* 359 Mich. 33, 101 N. W. 2d 227 (1960)).[9]

While the question is one of first impression in this Court, we believe that under recent developments in the law the entire proceedings against Den Norske, including the measure of damages, are governed by the principles of maritime law.

The Commissioners' determination to apply Michigan law to the question of the measure of damages applicable to Den Norske appears to have resulted from their misplaced reliance upon certain language in *Michigan Central v. Vreeland, supra,* but that determination had some basis in light of the then existing state of the law. Prior to its decision in *Moragne v. States Marine Lines,* 398 U. S. 375

9. The awards to the adult emancipated children for loss of love, companionship and guidance need no further discussion as it is now clear that such an award is not an element of pecuniary loss under the Michigan Wrongful Death Act (*Breckon v. Franklin Fuel Co.,* 383 Mich. 251, 174 N. W. 2d 836 (1970), and there is no contention that such an award is a proper element of damage under the general maritime law.

(1970), the Supreme Court had uniformly held that there was no liability for wrongful death under the general maritime law, and that absent a statutory right thereto, there could be no recovery by the next of kin of a decedent killed as the result of a maritime tort. Such was the rule of *The Harrisburg,* 119 U. S. 199 (1886), but its venerable teaching was specifically overruled by *Moragne v. States Marine Lines, supra.* Long before the overruling of *The Harrisburg,* the stringency of its rule denying recovery for wrongful death in admiralty under the maritime law led to the creation of exceptions to that rule. One of the judicially created exceptions to the stringent rule of *The Harrisburg* was that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co. v. Garcia,* 257 U. S. 233, 242 (1921).

The development and application of this exception to the general rule denying recovery inevitably led to questions of the appropriate substantive law to be applied where recovery was sought in one jurisdiction under a right created by another jurisdiction. In response, the courts fashioned a test of looking to the origin of the right sought to be enforced, holding that the court was bound to apply the law of the jurisdiction in which the right originated. *See The Tungus v. Skovgaard,* 358 U. S. 588 (1959); *Garrett v. Moore-McCormack,* 317 U. S. 239 (1942); *Curtis v. Garcia Y Cia,* 241 F. 2d 30 (3rd Cir. 1957). While it does not appear that the Commissioners engaged in such a reasoning process in making their determination, application of the test set forth above could lead to the result that the measure of damages applicable against Den Norske

was to be governed by the Michigan courts' interpretation of the Michigan Wrongful Death Act since, prior to *Moragne v. States Marine Lines, supra,* the claimants' right to recovery against Den Norske was rooted in that statute.

The decision of the Supreme Court in *Moragne v. States Marine Lines, supra,* which held that an action does lie under the general maritime law for wrongful death caused by a maritime tort, changes that result. Creation of a right of recovery for wrongful death under the maritime law eliminates the need for both the exception to the rule denying recovery and for the tests designed to implement that exception and permits all facets of that right of recovery, including the measure of damages, to be governed by the principles of the maritime law. We therefore hold the awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applicable only against Den Norske, to have been error. In so holding we recognize that in the proceedings below liability against Den Norske was premised upon the Michigan Wrongful Death Act. However, liability had never been in issue in this case, so the Supreme Court's creation of an additional or alternative basis for Den Norske's liability to the death claimants is of little importance compared to the pervasive issue with respect to all claims, i.e., the appropriate measure of damages. Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (*See Kossick v. United Fruit Co.*, 365 U. S. 731 (1961); *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917)), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (*Igneri v. Cie de Transports Oceaniques, supra; Simpson*

v. Knut Knutsen, O. A. S., supra; Valitutto v. D/S I/D Garonne, supra) and those recoverable under state law (*Montgomery v. Stephan, supra*). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

d. The Awards of Prejudgment Interest and the Failure to Discount Future Damage Awards to Present Value.

The two remaining significant issues can be quickly disposed of since they represent instances of the Commissioners' clear disregard of well established law of this Circuit.

In each of the death cases the Commissioners awarded prejudgment interest for the total dollar value of the awards from the date of death to the date of judgment. Such an award of prejudgment interest was error. *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622 (6th Cir. 1948).

The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U. S. 485, 491 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar

may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F. 2d 305 (6th Cir. 1969).[10]

Accordingly, in conjunction with the remand hereinabove directed, the District Court is directed to discount to present value all awards for future damages in accordance with generally accepted actuarial principles.[11]

e. Recapitulation as to Death Claims.

Items in the death claims which we have hereinabove determined were erroneously included in the awards as a matter of law are the awards to the widows for the loss of consortium and for the loss of their decedent's counsel, care and guidance, the awards to the adult, emancipated children for loss of love, companionship and guidance and the award of prejudgment interest on the total value of the awards for the interim period between the date of death and the date of judgment. On remand the District Court is instructed not to allow damages on account of these items. On such remand the District Court is further instructed to reevaluate and recompute the earnings capacity loss of each death claimant in accordance with the principles herein enunciated, specific reference being to the determination of the proper earnings base for the com-

10. In an attempt to salvage the Commissioners' determination that an offset was justified, claimants contend that the failure to discount to present value would be more than offset by future wage rate increases which they contend the Commissioners ignored. There is no competent evidence in the record to support this contention.

11. We recognize that the determination of the discount rate to be applied to an award for future damages rests within the sound discretion of the District Court. While we have serious reservations about a discount rate at 4% in light of the available return on investments today, we cannot say that the Commissioners' selection of 4% was an abuse of discretion. However, as pointed out above, such rate should be compounded in accordance with generally accepted actuarial principles.

putation of such earning capacity loss. The District Court is further instructed to discount to present value that portion of the award to each death claimant representing future damages in accordance with the principles herein enunciated. (Such instruction also has application to the personal injury claims; the District Court is similarly instructed to discount to present value that portion of the award to each personal injury claimant representing future damages.) In all other respects, no error is found to have intervened in the determination of damages in the death claims.

III. CONCLUSION.

The judgments of the District Court are vacated, and the causes are remanded for further proceedings consistent with the foregoing.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19837

IN THE MATTER OF:
THE PETITION OF
UNITED STATES STEEL CORPORATION
AND
PETITION OF DEN NORSKE AMERIKALINJE A/S,
OWNER OF THE M/S TOPDALSFJORD,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY.

UNITED STATES STEEL CORPORATION, ET AL.,
Petitioners-Appellees,

v.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR FUHRMAN, DECEASED, ET AL.,
Claimants-Appellants.

Before: PHILLIPS, *Chief Judge,* WEICK and PECK, *Circuit Judges.*

Judgment.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Filed Dec. 23, 1970.

APPENDIX H.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT.

In Admiralty No. A65-6.
IN THE MATTER OF
THE PETITION OF UNITED STATES STEEL CORP., AS OWNER OF THE STEAMSHIP CEDARVILLE.

In Admiralty No. A65-19.
IN THE MATTER OF
THE PETITION OF DEN NORSKE AMERIKALINJE A/S, OWNER OF THE M/S TOPDALSFJORD, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

Recomputation of Awards: Barbara J. Fuhrman, Administratrix; Elizabeth Haske, Administratrix; Marion Jones, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Stanley P. Mulka, Ronald G. Piechan, Raphael Przybyla, Walter Tulgetske.

Oliver Schroeder, Jr., Commissioner
The Law-Medicine Center
Case Western Reserve University
Cleveland, Ohio 44106

Robert J. Grogan, Commissioner
Leader Building
Cleveland, Ohio 44114

* * *

RECOMPUTATION OF DEATH CLAIMS: Fuhrman, Haske, . . .

In accordance with the instructions of the Court of Appeals, 6th Circuit, the following items of damage are excluded:

A. Widows' loss of consortium

B. Loss to minor children of decedents' counsel, care and guidance

C. Loss to adult, emancipated children of decedents' love, companionshp and guidance

D. Prejudgment interest on the total value of the awards for the interim period between death date and judgment date.

Also in accordance with the instructions of the Court of Appeals, 6th Circuit, the earning capacity losses have been determined for the four year prejudgment period on an annual earning capacity based on either the year immediately preceding the incident or the average of the four years preceding the incident whichever is the higher. In addition an annual wage increase of 1½% from death date to judgment date is applied. For the period from the judgment date to the final year of the work life expectancy, after review of the evidence, the findings of personal productivity and economic growth were made in each individual death claim as indicated in the recomputations.

Finally, the future damages of each award were discounted to present value at 4% per annum, compounded, to date of judgment. The dollar sums due each future year, including earning capacity loss and loss to minor children of counsel and guidance, were discounted for each year utilizing Table A, Appendix, *Financial Management*, Pearson Hunt and Victor L. Andrews, 1968, Richard D. Irwin Inc., Homewood, Illinois.

All other findings in the death claims set forth in the original awards of May 7, 1969, are incorporated herein and made a part hereof.

CLAIM OF BARBARA FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR FUHRMAN, Deceased.

A. Earning capacity loss based on highest earnings $5,889 (1964) with 1½% annual growth		23,127
Estimated earnings for 1965-6	$ 5,889	
Estimated earnings for 1966-7	5,977	
Estimated earnings for 1967-8	6,067	
Estimated earnings for 1968-9	6,158	
Recapitulation: Earnings	24,091	
add: Fringe benefits 20%	4,818	
	$28,909	
Deduct 20% from earnings for decedent's personal consumption	5,782	
	$23,127	
B. Decedent's counsel and guidance to minor children		12,000
James Arthur $1,500 annually for 4 years = $6,000		
June Ann $1,500 annually for 4 years = $6,000		
The most important years are the pre-school years for child guidance.		

C. Conscious pain and suffering of Mr. Fuhrman for a definite period of minutes while the *Cedarville* capsized and sank	5,000
Total prejudgment damages	40,127

II. *Future losses from May 7, 1969*

A. Earning capacity loss	140,760

Mr. Fuhrman has 32 years of work-life expectancy remaining. We use the annual earning capacity as $6,250 for these 32 years. We adjust for personal productivity and general economic growth by an increase factor of 2% based on his prior work habits and the general economic growth of the United States. For the first 15 years of these 32 years the family unit has four members. The decedent's personal consumption we determine as 30% because of his household activities and life in the off-shipping season. For the next two years the family has three members. Decedent's personal consumption is here determined as 40% for this period. For the final 15 years just two members remain as the two children reach majority. His personal consumption is set at 50%.

15 years x $6,250	93,750
Deduct 30% decedent's Personal consumption	28,125
	65,625
2 years x $6,250	12.500
Deduct 40% decedent's personal consumption	5,000
	7,500

15 years at $6,250	93,750	
Deduct 50% decedent's personal consumption	46,875	
	46,875	
Fringe benefits at 15% of $120,000 = $18,000		120,000 18,000
		138,000
Personal productivity improvement and general economic growth at 2% of $128,000		2,760
		140,760
B. Decedent's counsel and guidance to minor children		19,200
James Arthur 15 years x $600	9,000	
June Ann 17 years x $600	10,200	
Total future damages		159,960

Future damages of $159,960 discounted at 4% compounded annually equals $103,716

Total award due Fuhrman,

Administratrix =	$ 40,127	Prejudgment
	103,716	Future
	$143,843	Total

CLAIM OF ELIZABETH HASKE, ADMINISTRATRIX OF THE ESTATE OF STANLEY HASKE, Deceased.

I. *Losses from May 7, 1965 to May 7, 1969*

A. Earning capacity loss based on average earnings (1961-5) with 1½% annual growth	$8,069	$34,166
Estimated earnings 1965-6	$ 8,069	
Estimated earnings 1966-7	8,190	
Estimated earnings 1967-8	8,313	
Estimated earnings 1968-9	8,438	
	$33,010	
Recapitulation: Earnings	33,010	
add: Fringe benefits 15%	4,952	
	37,962	
Deduct 10% decedent's personal consumption	3,796	
	34,166	
B. Decedent's counsel and guidance to minor children		20,000
Gregory Stanley 4 years at $1,000 annually = $4,000		
Kenneth Raymond 4 years at $1,000 annually = $4,000		
Alan Mitchell 4 years at $1,000 annually = $4,000		
Brian Keith 4 years at $1,000 annually = $4,000		

Steven Paul 4 years at $1,000 annually = $4,000

Decedent was most attentive to the children in a well organized way

C. Conscious pain and suffering of Mr. Haske for a definite period of minutes while the *Cedarville* capsized and sank. 5,000

Total prejudgment damages $59,166

II. *Future losses from May 7, 1969*

A. Earning capacity loss 163,761

Mr. Haske has 25 years of work-life expectancy remaining. We use the annual earning capacity of $8,565 for these years. We adjust for personal productivity and general economic growth by an increase factor of 2% based on his prior work habits and the general economic growth of the United States. Personal consumption of decedent is determined to be as follows:

For 3 years two parents and 5 children (1969-72)	25,695
Less 10% decedent's personal consumption	2,570
	23,125
For next 2 years two parents and 4 children (1972-74)	17,130
Less 15% decedent's personal consumption	2,570
	14,560

For next year two parents and 3 children (1974-75)	8,565	
Less 22% decedent's personal consumption	1,884	
	6,681	
For next 6 years two parents and two children (1975-81)	51,390	
Less 28% decedent's personal consumption	14,389	
	37,001	
For next 3 years two parents and 1 child (1981-84)	25,695	
Less 40% decedent's personal consumption	10,278	
	15,417	
For last 10 years only the spouses remain (1984-94)	85,650	
Less 50% decedent's personal consumption	42,825	
	42,825	
		139,609
Fringe benefits at 15% of $139,609 equal $20,941	20,941	
	160,550	
Personal productivity improvement and general economic growth at 2% of $160,550		3,211
Loss of future earning capacity		$163,761

B. Decedent's counsel and guidance to minor children		24,600
Gregory Stanley 3 years x $600	1,800	
Kenneth Raymond 5 years x $600	3,000	
Alan Mitchell 6 years x $600	3,600	
Brian Keith 12 years x $600	7,200	
Steven Paul 15 years at $600	9,000	
	$24,600	
Total future damages		$188,361
Future damages of $188,361 discounted at 4% compounded annually equals $124,561		

Total award due Haske,
Administratrix = $ 59,166 Prejudgment
124,561 Future

$183,727 Total

* * *

RECOMPUTATION OF PERSONAL INJURY AWARDS: Holley, . . . Piechan, Przybyla.

The Commissioner's Awards and Opinions of May 7, 1969, are incorporated herein and made a part hereof as altered by the matters set forth in the General Statement below. Cited materials herein are identified from the trial record as follows:

K—Hearing Record, April 24, 1968, Jacob Krause, M. D.

R—Hearing Record, May 28, 1968, Robert J. Roehm, M. D.

S—Hearing Record, June 26, 1968, David Sprague, M. D.

H—Hearing Record, March 20, 1968, Billy R. Holley

K—Hearing Record, March 20, 1968, Jerome Kierzek

M—Hearing Record, March 18, 1968, Stanley Mulka

P—Hearing Record, March 20, 1968, Ronald G. Priechan

PR—Hearing Record, March 18, 1968, Raphael Przybyla

Rejected as a matter of law by order of the Court of Appeals, 6th Circuit, are:

1. Loss of earning capacity for all seven personal injury claimants from the date of the sinking to judgment date.
2. Maintenance and cure for Pryzbyla, Holley, Idalski and Tulgetske from date of the sinking to judgment date.
3. Future medical expenses for all seven personal injury claimants.
4. Loss of future earning capacity of Mulka.
5. Loss of life's pleasures of Kierzek.

All other items of damage were reevaluated in light of the expunging of the entire testimony of Harold Dillon, M. D., expert psychiatric witness for the personal injury claimants.

Where future damages are awarded the gross amounts are discounted to present value at 4%, compounded annually, by utilizing Table A, Appendix, *Financial Management*, Pearson Hunt and Victor L. Andrews, 1968, Richard D. Irwin Inc., Homewood, Illinois.

ILLY R. HOLLEY

Recomputation of damages based on the findings of acts narrated in the original award and further explained s follows:

At the moment of collision Mr. Holley was asleep. A hipmate yelled to him that a collision had occurred and he ship was sinking. He dressed, put on his lifejacket, vent to the starboard lifeboat station. He helped to lower he lifeboat then went down to the main deck where he vatched the forward end crew trying to place the collision nat over the hole in the *Cedarville*. He remained at his station with others watching the ship settling in the water awaiting the order to abandon ship which never came. When waves came over the bow the starboard lifeboat swung out so he ran across and jumped into the port lifeboat. The vessel then rolled over on her starboard side and went down. He next recalls standing in the lifeboat alone, all wet. Several shipmates were hanging onto the lifeboat. Many were screaming for help. He pulled three shipmates into the lifeboat. He struggled with the cotter key and pin to get it loose from the davits, all the time fearful of an explosion or being sucked under by the sinking ship. Once the lifeboat was released from the *Cedarville*, complainant and his colleagues saw another shipmate in the water. They pulled him in; he appeared to be dead. The ship then went down amidst the yelling of shipmates. Six more shipmates were then rescued. The lifeboat, with Mr. Holley apparently in charge, kept moving around in the fog seeking more seamen to rescue. Finally the motor launch from the "Weissenburg" came alongside and towed his lifeboat to that vessel. Claimant boarded the vessel very scared and cold, severely shaking.

Several hours later claimant was in the Cheboygan Hospital where black and blue spots were noted on back

and shoulder. Abrasions on his legs were bandaged. He was released from the hospital and went home. While in a hot bath at home, he asked for a doctor. He returned to the hospital where he remained the night. He had pain in his back, legs, head, stomach and right shoulder. X-rays were taken; several types of sleeping pills were given to him. All of his pains continued the following morning when he was again released from the hospital. He was very nervous and upset.

Dr. Krause's testimony identified Holley's disability as:

> "a post-traumatic degeneration of the intervertebral disk between the 5th lumbar and 1st sacral vetebrae . . . because of this, this man has developed a secondary chronic lumbosacral sprain or low back instability and mechanical inadequacy." (K 342).
>
> ". . . surrounding areas must overwork in order to maintain posture and certainly to undertake stress. They become fatigued, and they give what this man describes as ache or pain. And it is basically, a mechanical inadequacy, instability and, if you will, weakness of the back secondary to this degeneration, post-traumatic in nature, of the lumbosacral intervertebral disk." (K 342).

This disability is the direct result and residual of the events and trauma of May 7, 1965, (K 345-6).

Furthermore: the condition is permanent and will worsen:

> "It can move only in one direction—if it is going to move—that is, worsen itself, only with the imposition of a serious surgical procedure with, at best, a 50-50 chance of succeeding, that this man has an opportunity for relieving himself of some of his pain; or his al-

ternative: to seek working duties, living activities, which impose minimal mechanical stresses through his lower back.

"I wish to point out that this change in occupation won't cure all of the back problem. It will just reduce his symptoms that he experiences from this back problem." (K 348).

Dr. Sprague identified temporary mental disability in Holley as the result of the May 7, 1965, event:

"It seems impossible to believe he went through this thing unscarred. A man of this nature would be unable to go through an experience like that without measurable disruption of some part of his personality.

"The nature of this personality disruption that has been created by going through this, in other words, is complicated by his moving to a different culture, by his liability to tolerate the teen-agers; and yet, there was also a disruption relating to the sinking that I think is an appreciable amount of his current difficulties." (S 62-3).

A permanent intensive mental hurt in this claimant could not be discerned, however, by Dr. Sprague. (S 63).

Dr. Roehm corroborated temporary injury to Holley's back as a result of the accident and possible recurrent low back strains. (R 107-108).

Holley's testimony revealed the use of a brace, continued back pain, specially prescribed diet, poor sleeping habits, nightmares, emotional difficulties at home, reduced social life. (H 31-39).

Based on the above, findings of facts of permanent partial physical disability, temporary partial mental disability and future loss of earning capacity are made with damages designated as follows:

I.	*Damages from May 7, 1965 to May 7, 1969.*		
	A. Pain and suffering	26,000	
	1. $20,000 for the May 7 incident		
	2. $1,500 per year for 4 years since		
	B. Loss of life's pleasures $2,000 per year for 4 years	8,000	
	Prejudgment damages	34,000	$34,000
II.	*Damages from May 7, 1969*		
	A. Loss of earning capacity 24 years of work life expectancy with $3,000 annual loss	72,000	
	B. Pain and suffering 34 years of life expectancy at $500 per year	17,500	
	C. Loss of life's pleasures 34 years of life expectancy at $200 per year	6,800	
	Future Damages	96,300	
	Future damages $96,300 discounted at 4% compounded annually equals $58,633		$58,633
	Award		$92,633

RAPHAEL PRZYBYLA

Recomputation of damages based on the findings of facts narrated in the original award and further explained as follows:

At the time of the collision on May 7, 1965, Mr. Przybyla was asleep. A shipmate's hammering on the wall alerted him to the situation. After jumping out of bed, he saw a big, black object—the bow of the other ship. He dressed, ran to his lifeboat station, helped to lower the boat, awaited orders. He was most frightened since he knew the ship would sink at any moment. After failure to launch the lifeboat, he was thrown into the water where he remained about 15 minutes before reaching a raft. He was very scared and cold; he heard men screaming for help. On the raft with others, he observed a vessel bearing down on them and was sure the raft would be hit. The raft drifted alongside the *Weissenburg* which he then boarded. Several hours later at the Cheboygan Hospital he complained of neck and shoulder pains. He had bruises under his arms and on his legs. He went home the same night. He could not sleep; his pains continued.

Dr. Krause's testimony identified claimant's condition as a chronic musculo-ligamentous sprain of the soft tissues plus a definite discogenic degeneration of the intervertebral spaces between the 4th and 5th, 5th and 6th cervical vertebrae. This degeneration may have existed prior to May 7, 1965, but if it did there occurred aggravation of the pre-existent abnormal intervertebral disk spaces. (K 406-407). Furthermore Dr. Krause stated:

> ". . . this chronic musculo-ligamentous sprain of the soft tissues about the cervical spine of the trapezius, in my opinion, is the direct resultant and residual of the accident and forces of May 7, 1965."

> ". . . with reference to the discogenic degeneration, of—and, for a matter of convenience, I am going to say—mid portion of the cervical spine, it is my opinion that the events of May 7, 1965 either completely are the cause for the present abnormality, or definitely aggravated or worsened what may have been a pre-existent situation." (K 408)

These conditions are permanent. They will be progressive depending on the amount of physical stress imposed through the body. (K 410). Medically these conditions are disabling.

> "This man will have to seek a sheltered, protected, tailored working—environmental working conditions if he is going to be able to continue for many more years on useful, gainful employment." (K 411-412)

Przybyla is not totally disabled but partially permanently disabled, medically speaking, from sea work. (K 414).

Dr. Roehm diagnosed a degenerative intervertebral disk disease, primarily to the cervical spine. (R 145). Dr. Roehm stated this disabling condition could be the result of the wear and tear of life or past injury. (R 146). Dr. Roehm specifically indicated the causative impact of the accident of May 7, 1965:

> "The changes, however, appear to be long-standing enough to state that they probably had begun to appear prior to the date of the accident, but the accident itself most likely aggravated the existing degenerative intervertebral disk disease enough to create the onset of his symptomatology." R 156).

Dr. Roehm also referred to the permanent effects of this condition.

"As regards to his prognosis, I feel that he probably will continue to note some discomfort in his neck at intervals of time which possibly may become severe enough in the future to warrant some kind of treatment."

"It is entirely possible of course, that future aggravation of the existing degenerative disease may initiate more severe symptomatology than he now expresses, and that additional or future injury may result in increased disability on his part." (R 156-157).

Dr. Sprague identified mental disability resulting from the May 7, 1965, incident:

"So I think we might say without question that he approached the job on the Cedarville with feelings full of conflict and somewhat mixed. It was with more than the usual reaction that he experienced the accident.

There is no doubt this ruined the pathway to the life he hoped would make it better for him, and the fact that this too went sour would account for a great deal of the anger one feels is in this man." (S 105).

"I see little reason to doubt that this man is somewhat different than he was prior to the sinking of the ship. It is indeed unfortunate that his fancied plans did not work out.

Again I see little evidence of current disability but rather the persistence of some uncomfortable symptoms which are largely referable to the fact that what had been a hoped-for solution to his problems backfired." (S 106).

Even more importantly was the disintegration of Przybyla's relationship with his wife which got worse after the sinking of the Cedarville. (S 115).

The testimony of claimant's wife explained the changed family relationship and social life of claimant. (PR 81-87).

Based on the above, findings of facts of permanent partial physical disability, temporary partial mental disability and loss of future earning capacity are made with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969*		
A. Pain and suffering	$20,000	
1. $10,000 for the May 7, 1965 event		
2. $2,500 per year for 4 years—$10,000		
B. Loss of life's pleasures $2,500 per year for 4 years	10,000	
Prejudgment damages		$30,000
II. *Damages from May 7, 1969*		
A. Loss of earning capacity 29 years of work-life expectancy with $1,000 annual loss	29,000	
B. Pain and suffering 35 years life expectancy at $500 per year	17,500	
C. Loss of life's pleasures 35 years of life expectancy at $500 per year	17,500	
Future damages	$64,000	
Future damages $58,000 discounted at 4% compounded annually equals $35,640		$35,640
Award		$65,640

RONALD G. PIECHAN

Recomputation of damages based on the findings of facts narrated in the original award and further explained as follows:

At the time of the sinking he was washing clothes in the laundryroom. He heard a whistle very close. Peering out the deadlight he saw a ship bearing down in the fog. He knew a collision was imminent. After starting for his cabin and as he stepped out of the laundryroom the collision impact occurred. He heard metal crunch and felt the jar of the impact. He then ran to the tunnel space of the ship thinking his helper was still working there. When he found no one he went to his cabin where his helper was. After putting on his lifejacket he went topside. Mr. Piechan's brother, the chief mate, told him to get the collision mat. He helped to throw it over the hole in the ship's side but it did not stop the heavy inrushing of water. Claimant then went to his lifeboat station and aided in lowering the boat. He then just stood with others on the main deck waiting the order to abandon ship which never came. When the decks became awash, he along with others climbed into the lifeboat; the vessel then rolled over throwing Mr. Piechan out of the lifeboat up against the aft cabins by the galley door. His glasses and cap were knocked off. Thereupon he jumped into the water and swam to the lifeboat. One shipmate (Holley) was already in the boat and helped Mr. Piechan into the boat. He aided in seeking to file the painter so that the lifeboat could be rowed away from the *Cedarville*. The hatchet normally kept for this purpose was not in the lifeboat. A body then bobbed up beside the boat. He helped to pull it into the boat. In so doing the body fell on top of Mr. Piechan pinning him to the bottom of the boat. The body was not pulled off for a period of time as others now in the lifeboat struggled to release the

boat from the *Cedarville.* When released the boat was rowed about as they sought to rescue the shipmates who were crying for help in the fog. Cold water, fear of explosion of the ship's boilers and terror at being sucked under, all were most threatening. Claimant had a further fear, for he could not locate his brother. Finally after much shouting he heard his brother's call from a raft. Claimant was in the lifeboat about an hour when rescued by the *Weissenburg.* Aboard the rescue ship he was unable to eat. Upon reaching shore claimant was driven home by a friend. He did not go to the hospital. A nephew remained overnight with him. He spent sleepless hours for several nights.

Dr. Krause testified (K 385-8): Piechan has a post-traumatic chronic synovitis of each knee joint, post-traumatic sprain of the medial collaterial ligament of the right knee joint, a chronic post-traumatic tenosynovitis of the flexor tendons of the 2nd, 3rd and 4th fingers of the right hand. Dr. Krause further stated that these conditions are a resultant and a residual of the events of May 7, 1965, and are permanent. The knee condition will worsen and the hand condition will not, but will remain as is.

Furthermore Piechan should not do sea work because of the unfavorable climate, (K 390), and shorework should not include working on his feet but rather a sitting job is essential. (K 390-391).

Dr. Roehm did not examine the right hand (R 121) and acknowledged that Piechan had swelling in the right knee joint which "might bear some investigation". (R 120). Dr. Roehm did diagnose signs and symptoms of change in of the kneecap which he attributed basically to the aging process. (R 118).

Dr. Sprague stated:

"I am sure that at times he has undoubtedly suffered disturbed sleep, and one can already see the new kind

of compromise with which he is trying to handle this difficulty when one sees him planning to retire as soon as he can and even making an open offer to work ashore if he can take his retirement credits with him."

"I got the impression that this man did suffer a measure of disability after the sinking and has made an adequate recovery, but that he will be tempted to utilize his old defensive pattern of compromise to protect himself." (S 100).

Claimant Piechan stated that after the incident difficulty in sleeping, nervousness, irritability at work, nightmares, inability to eat certain foods, restricted social activities have resulted. (P 25-26).

Based on the above, findings of fact of a permanent partial physical disability, temporary partial mental disability and loss of future earning capacity are made with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969*		
A. Pain and suffering	$14,000	
1. For the May 7th event—$10,000		
2. For the 4 years since the sinking—$1,000 per year—$4,000		
B. Loss of life's pleasures $1,000 per year for 4 years	4,000	
Prejudgment damages	$18,000	$18,000
II. *Damages from May 7, 1969*		
A. Loss of earning capacity 24 years of work-life expectancy at $800 per year	18,400	

B. Pain and suffering 34 years of life expectancy at $300 per year	11,200	
C. Loss of life's pleasures 34 years of life expectancy at $100 per year	3,400	
Future damages	$33,000	
Future damages $33,000 discounted at 4% compounded annually equals $19,661		19,661
Award		$37,661

* * *

Recomputation of Personal Inquiry Awards: Idalski, Tulgetske

It is to be noted that the testimony of Dr. Harold Dillon is excluded completely in considering recomputation of awards for Idalski and Tulgetske. This is as per the order of U. S. Court of Appeals Sixth Circuit. Cited materials herein are identified from the trial record as follows:

S—Hearing period June 26, 1968
DAVID SPRAGUE, M. D.

K—Hearing period April 24, 1968
JACOB KRAUSE, M. D.

R—Hearing period May 28, 1968
ROBERT J. ROEHM, M. D.

MICHAEL IDALSKI

At the time of the collision, Idalski was asleep. He awoke, went on deck, then put on a lifejacket and helped lower the lifeboats to the rail of the main deck. He then proceeded below to assist in starting the pumps. After he had completed this task, he returned to the main deck. By that time the *Cedarville* was beginning to capsize to starboard. He went to the port lifeboat and was pulled in by the men in that boat.

At about that time the *Cedarville* went over so fast to starboard that he was thrown out of the lifeboat and into the water. He was pulled under the water, then surfaced and began to try to attract attention. He grabbed hold of a bumper block to stay afloat. He was in the water, at his best estimate, about 45 minutes before he was pulled up on a life raft. A little later, Idalski and the men on the life raft were picked up by the German motorship. He received medical attention while on board that ship. He was then transferred to a Coast Guard cutter and later dropped off at Mackinaw City. From there he was taken to the Cheboygan Hospital in Cheboygan, Michigan. He was treated there for cuts and abrasions of his left leg, shin and left elbow. He was X-rayed, his wounds were dressed, and he was released to his home at Rogers City, Michigan that same day.

Dr. Sprague conducted an unstructured psychiatric interview lasting between 45 and 60 minutes on February 15, 1968. The Claimant Idalski's chief complaint was that he was occasionally jumpy, had some trouble sleeping, sometimes noises bothered him. He spoke of some pain in one arm and the left leg. He gave a history of having had pain in the stomach in July of 1965. (S-30).

Dr. Sprague testified on direct examination by counsel for the defendant. He stated that he did reach a finding

and conclusion as a result of his examination. Dr. Sprague stated, "It seemed to me that this man had some residual scars from this experience." Asked what experience he was referring to, Dr. Sprague replied, "By his being present at the sinking of the *Cedarville*." (S-34).

Dr. Sprague further stated, "and that this was manifested by the irritability he talked about, the difficulty with sleeping. I was not able, to my own satisfaction, to be certain that there was a direct connection to what he calls his nervousness and his pain and yet this deserves some study and consideration." (S-34-35).

Dr. Sprague did feel that despite the aforesaid conditions the claimant was functioning reasonably well as an officer aboard the ship he was on, and that the basic difficulty one might consider him having was these residual, emotional symptoms affecting him in this way. (S-35).

Dr. Sprague was cross examined at length by counsel for the claimant and the doctor's notes taken in the course of examination were referred to rather extensively by counsel for the claimant. The notes of the doctor and the report which was based upon said notes did state that the doctor would have needed more time with the claimant to allow for a more precise determination of the level of possible disability from which he might suffer. The doctor's report stated, "It is my impression that further time spent with this man might allow for a more precise determination of the level of disability from which he might suffer." (S-41).

Dr. Sprague concluded, "that there appears to be no doubt that this man has some residual scars from his experience with the sinking." (S-41).

On further cross examination, the doctor found that there was very little difference in claimant's social life prior to and subsequent to the collision. (S-42).

JACOB KRAUSE, M. D., testified for the claimant Idalski as an Orthopedic Specialist, and stated that he examined the claimant in his office on February 9, 1968. The history given by claimant to the doctor was excluded and no testimony was admitted through Dr. Krause as to the history given to him by the claimant Idalski. Dr. Krause found some vague spasm involving the crest of the left trapezius muscle. (K-176). The doctor considered X-rays of the area of the left shoulder. He found a separation, dislocation of the left acromioclavicular joint as compared to the right. (K-186-187). The doctor further examined claimant's lower extremities and found that the claimant Idalski suffered from a post-immersion type of arthritis, where the joints were exposed to immersion, particularly cold water. (K-190).

Dr. Krause reiterated his opinion that claimant has a separation, post traumatic in nature, involving the left acromioclavicular joint. (K-190).

With reference to the left ankle joint, it was the doctor's opinion that claimant Idalski had a post traumatic meniscoid of the left fibuloastragalar joint. (K-103-194). The conditions were, in his opinion, permanent with some possibility of improving the situation of the left ankle joint. (K-194). The doctor stated that the left shoulder injury and the left ankle joint injury were due to direct trauma injury. (K-198).

On cross-examination of Dr. Krause, the doctor stated that the left ankle condition has, in his opinion, persisted over a period of somewhere between two to four years. (K-226). He further stated that the condition of the left shoulder was pain-producing. (K-299). That said pain would be progressive and increasing depending upon the speed and the development of the post traumatic osteoarthritis that will develop. (K-229).

The doctor further noted that there was some discoloration on both legs and that such discoloration would be evidence that there had been an abrasion-type injury at these zones at some time prior to examination. (K-242). The doctor stated, further, under cross-examination, that in effect the claimant was endangering himself by continuing to work at sea, especially with regard to the condition of his left shoulder. (K-244).

The testimony was concluded by the doctor's conclusion that the claimant would have pain on certain attitudes and under conditions of stress, and that otherwise the claimant would normally not be aware of pain. (K-246-247).

ROBERT J. ROEHM, M. D., an Orthopedic Specialist, next testified on behalf of the defense. Dr. Roehm examined the claimant Idalski in his office on March 19, 1968, for a period of approximately 15 minutes to a half hour. (R-9).

Dr. Roehm stated that the claimant complained of pain in his left shoulder and in both of his lower extremities. (R-10). X-rays were taken of the left shoulder by a radiologist recommended by the doctor. (R-14-15). In Dr. Roehm's opinion these X-rays showed no significant abnormalities. (R-16).

Dr. Roehm found no objective evidence of ill being as a result of his physical examination. (R-17).

The X-rays did show an arthritic condition existing in the right acromioclavicular joint. (R-21).

Further, the doctor disputed the fact of the existence of a shoulder separation. (R-22). As far as the lower extremities, the doctor's opinion was that the claimant was suffering from bilateral varicose veins. (R-24).

X-rays of the knee were taken at the doctor's request

and the doctor found minimal degenerative change compatible with age. (R-28).

The doctor found the claimant able to work and recommended no treatment other than some possibility that the varicose veins would require treatment. He suggested the possibility of degenerative tendinitis in the left shoulder as causing the problems in that area for the claimant. (R-39).

Dr. Roehm was cross-examined at length by the counsel for the claimant. The examination notes and the doctor's report to counsel were examined and referred to in cross-examination of the doctor by the counsel for the claimant.

The report of the doctor to counsel alluded to the possibility that the injuries sustained by the claimant aggravated a pre-existing condition, namely, very minimal varicosities in both of the lower extremities. (R-55).

The report of the doctor further stated, "It is entirely possible that Mr. Idalski received an injury to the tendinous cuff of the left shoulder joint as a result of the accident itself. This would cause his present symptomatology. I do feel, however, that these symptoms are minimal in nature and have, up to the present time, not been considered severe enough by the patient to warrant any treatment. These symptoms have evidently not created any disability in relationship to his work. I doubt that the patient has received any serious injury to the tendinous cuff of the shoulder. It is my opinion that this injury has been more of a strain to the tendinous cuff which has probably been aggravated from time to time by his activities." (R-56)

On further cross-examination, the doctor stated, "I firmly believe this man has some problem with his left shoulder. How much his reported injury, or whether he got injured or not in this fall, I have to take at face value. This is what I am reporting from what he tells me, he has

pain since that particular date and I have to take his word for it." (R-59)

The doctor further found a tenderness three years later in the anterior aspect of the shoulder joint. (R-60)

Based on the above findings of fact of permanent partial, physical and mental disability are made with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969*		
A. Pain and suffering	$10,000.00	
1. For the May 7 incident		
2. For the 4 years since the sinking, $3,000.00 per year	$12,000.00	
Prejudgment damages		$22,000.00
II. *Damages from May 7, 1969*		
A. Pain and suffering		
19.2 years of life expectancy at $1,000.00 per year for 10 years and $500.00 per year for 9.2 years	14,600.00	
B. Future damages		
Future damages $14,600.00, discounted at 4%, compounded annually = $10,670.60		10,670.00
Award		$32,670.00

TER TULGETSKE

At the time of the collision he had been putting away ies on the fantail of the ship. He heard the long blast e ship's whistle. He went to his Chief's room, and ated that at that time the ship started to take on a ic list. He put on his life jacket and was directed by hief to the lower engine room where they checked the ge to the tanks. He was then directed topside to where the damage was. He found that the damage n the number 4 tank. Then he proceeded back down e engine room where he reported these facts to his Engineer.

Tulgetske began one of the pumps below, then got the ping pump ready and was once more ordered topside t help. He went topside, found Idalski and another and they went down to the lower engine room to get ther pumps ready. They got all the pumps running, Tulgetske proceeded up to the main engine room, and a few minutes there went topside. As he came up the r to the fantail, he found a gasket around the gang-door on the starboard side leaking, so he stopped and ened up the dogs on the door, then went on up to the deck. As he got up there, he went to the starboard nd saw water coming down the deck from the forward of the ship. The he jumped into a lifeboat and the rolled to starboard, and as it did so, he jumped out of oat into the water. He went under water, but man-to surface. He found he was in a dense fog, with for help all around him. He was afraid. He saw a aft floating nearby so he started swimming for it, but fted away in the fog. He was in the water, to his estimate, for about one-half hour before being picked the ship's port lifeboat. From there he was taken d the German motorship and then transferred to the

Coast Guard Cutter and taken to Mackinaw City. Then he was taken to the Cheboygan, Michigan hospital. He was numb and sore and cold all over. After being released from the hospital on that same day, he went to his home where his wife rubbed him with liniment. He used a hot pad, took some aspirin, and just rested. He could not sleep. He was nervous, depressed and still scared. His chest and arm were black and blue, and he was still sore the next day and had a severe headache.

Tulgetske was off work for a while, attended funerals of his deceased shipmates the first week, then the second week helped to search in the Straits area for bodies of the men who went down with the *Cedarville*. He was paid by the company for his time off. He returned to work on May 30, 1965, and has been sailing ever since. He states that he is scared in fog and in storms on the lake. He claims he cannot sleep as he did prior to the sinking, that he has a nervous stomach, and severe headaches. These conditions did not exist prior to the accident either.

Tulgetske especially mentioned his right arm giving him trouble, also his shoulder, his back and legs. He also referred to his nervous condition, which he said was bad. Tulgetske recounted that during the 1966 season he was in such a condition that he called the Fleet Captain and asked if he could get a trip off the ship to go to the doctor, but was discouraged by his superior and did not take time off to go. He has been using his own remedies, hot pad, liniment, and he has purchased a vibrator for use on his back and legs. He did see a chiropractor, a Dr. Flagg, in the winter of 1966 for his back and legs, but noted only temporary relief and discontinued going to the doctor after a short time.

Tulgetske alluded to the great change in his home and social life after the collision. He did not go out with his

wife as he used to, was moody and depressed around the house, and was often short and curt with his wife. Following her death in 1967, he was even more depressed and regretted the way he had treated his wife in the time between the collision and her death. He no longer engaged in "winter work" as he did prior to the collision, stating he did not feel able to perform such work. It was brought out in cross-examination that prior to the sinking of May 7, 1965, he did apply for an extended vacation in the 1966 off season. It was also noted on cross-examination that Tulgetske saw a Dr. Foley in Rogers City in 1967, to be examined for life insurance, but that he did not mention to the doctor any of his complaints of injuries arising out of the 1965 collision.

Dr. Sprague, M. D. examined claimant Walter Tulgetske on February 15, 1968, for the purpose of conducting a psychiatric evaluation and making a report for the defense. This was in the nature of a psychiatric interview, and Tulgetske's complaints were generally that he was suffering from difficulties with his nervous system. Dr. Sprague found that Tulgetske, at that time a 46-year old man, was undoubtedly suffering from a depression. This was in February of 1968. He did state that the cause of this depression was really up for question. (S-46) Tulgetske was at that time still functioning as a Chief Engineer, although he stated to the doctor that he would retire as soon as possible. (S-46)

The doctor's opinion as to the cause of claimant's difficulties, both physical and mental, was that, "If he were forced to give an answer, I would say about 25% of his present difficulties could be directly ascribed to the difficulties from the sinking to which he was subjected." (S-47)

The doctor stated further, "The main difficulty I face now is that the other symptoms of irritability, upset in

the fog and stormy weather go with both depression and post-traumatic neurosis, and I mean it when I say it is impossible to draw the line which one is which." (S-48)

Council for the claimant then examined the doctor's notes made at the time of the examination, consisting of a one-page yellow sheet referable only to Tulgetske. On cross-examination, counsel for the claimant secured an admission from the doctor that the complicated problem of existing disability was almost impossible to achieve in any precise degree. (S-50)

The doctor further admitted that the most striking feature concerning claimant during the doctor's examination was that the claimant did appear to be depressed. (S-51)

JACOB KRAUSE examined claimant Tulgetske on February 7, 1968. Since the direct examination was by counsel for the claimant we took the testimony as claimant's testimony on behalf of claimant. The doctor found, upon examination, that there was definite softness of the tone of the right biceps brachii muscle. There was found a loss of tone or elasticity or feel under any given condition of attitude or posture in the area of the right brachii muscle. (K-56)

In the area of the low back, the doctor noted a mild degree of spasm involving the muscles lying to the left side of the lumbar spine. (K-58)

Continuing on testimony involving claimant's back, the doctor notices a narrowing of the disc space in the lumbosacral intervertebral disc. This was noted upon examination of x-ray films which were ordered by Dr. Krause of the affecting areas of complaint of the claimant. (K-70)

The doctor's findings generally were with reference to the upper right extremity, that the claimant had suffered a

partial rupture or tear involving the distal end of the right biceps brachii muscle. Further, that he had suffered a post-traumatic degeneration of the lumbosacral intervertebral disc with a secondary chronic musculo-ligamentous sprain and low back instability with mechanical inadequacy. (K-73-74)

Further, it was the doctor's opinion that both of the conditions were due to trauma or injury. (K-75)

The doctor felt that the condition of the right muscle was permanent in nature; (K-75-76) that it was disabling for given conditions which were set forth. (K-76) The condition of the back was regarded as a permanent condition, and with a definite possibility of said condition worsening in the area of the back. (K-77) The opinion was that the claimant should not be permitted to do what was normally called manual labor, especially that in which his lower back must participate to any extent. (K-78) It was further, the opinion of the doctor that the claimant should not be allowed to return to work aboard ship in any capacity. (K-83)

Although the history given by claimant to the doctor was specially excluded, it was interesting to note that the defense raised the history in cross-examination of the doctor. Since the specific event was particularly raised by the defense, the doctor was permitted to answer that it was his belief that the fact that claimant was thrown from the deck of the ship into the cold water when the ship sunk was a competent force to cause a trauma to an intervertebral disc, with subsequent degeneration. (K-101)

ROBERT J. ROEHM, M. D. examined claimant Tulgetske for the defense on March 12, 1968, for the purposes of examining him for complaints of pain in his right arm and in his back and in both of his lower extremeties. This

was a physical examination of parts of the body about which claimant complained, and took approximately 15 minutes to one-half hour. The doctor referred to his records in stating that claimant complained at that time of pain in his right arm, in his lower back, and in both of his lower extremeties. (R-64) The examination of the right arm "revealed the presence of what appears to be an old tear of the distal tendon of the biceps muscle, or at least a portion of it, resulting in a bunching together of the muscle fibers in the midportion of the arm." (R-64) The doctor felt that claimant was definitely weaker in this area. (R-65) The doctor stated that in his opinion the claimant was disabled in a very minimal way, and as to his specific occupation that he was not disabled from carrying this on. (R-66)

As to claimant's lower back, the doctor found definite limitation of the normal range of motion for a man of claimant's age in all directions. (R-75) The condition was identified by the doctor as a degenerative intervertebral disc disease in the low back (R-77). The doctor felt that the claimant was not disabled, but could fulfill the duties of his occupation, but further added that claimant will continue to degenerate these discs as he gets older. (R-77) He further recommended a drug which might possibly alleviate some of the condition of claimant's discomfort. (R-78)

Claimant's counsel cross-examined the doctor at length and referred to the doctor's report made to the defense after his examination. The report of the doctor stated as follows:

> "I feel that Mr. Tulgetske has very definite evidence of nerve root compression of the fourth lumbar nerve root on the left at the present time. This nerve root is usually compressed by the 3rd lumbar disc, and since he stated he has never noted any low back dis-

comfort prior to the date of the accident, I feel that the on-set of the symptoms of a degenerating 3rd lumbar disc, probably, occurred as a direct result of this accident. He also possesses evidence of a partial tear of the distal tendon of the right biceps muscle, and he stated that this particular abnormality occurred as a direct result of the accident. I feel that in these two particular major complaints, Mr. Tulgetske showed, on physical examination, definite evidence of having the disabilities mentioned." (R-82-83)

The doctor reiterated that he still felt the same way about the claimant's condition as he did in his report to the defense.

The defense then called for a redirect examination and the doctor did state that the compression was minimal and mild. (R-84)

Based on the above, a finding of fact of partial mental and physical disability is made, with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969.*		
A. Pain and suffering		
1. For the May 7 incident	$10,000.00	
2. For the 4 years since the incident at $4,000 per year	16,000.00	
		26,000.00
B. Loss of life's pleasures		
1. $3,000 per year for 4 years	12,000.00	
		$38,000.00

II. *Damages from May 7, 1969.*

A. Loss of earning capacity, 18 years of work life expectancy at $2,000 per year	36,000.00	
B. Pain and suffering, 25.2 years life expectancy, 10 years at $1,500 per year, 5 years at $1,000 per year, and 10.2 years at $500 per year	25,100.00	
C. Loss of life's pleasures, 25.2 years life expectancy, 5 years at $1,500, 5 years at $1,000 per year, 5 years at $500 per year	15,000.00	
Future damages	76,100.00	
Future damages $76,100 discounted at 4% compounded annually equals $54,733.10		54,733.10
Award		$92,733.10

Respectfully submitted,

OLIVER SCHROEDER, JR.,
Oliver Schroeder, Jr.,
Commissioner.

ROBERT J. GROGAN,
Robert J. Grogan,
Commissioner.

November 24, 1971

Received and accepted this 24th day of November, 1971.

JAMES C. CONNELL,
United States District Judge.

APPENDIX I.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT.

In Admiralty No. A65-6.
IN THE MATTER OF
THE PETITION OF UNITED STATES STEEL CORP., AS OWNER OF THE STEAMSHIP CEDARVILLE.

In Admiralty No. A65-19.
IN THE MATTER OF
THE PETITION OF DEN NORSKE AMERIKALINJE A/S, OWNER OF THE M/S TOPDALSFJORD, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

Recomputation of Awards: Barbara J. Fuhrman, Administratrix; Elizabeth Haske, Administratrix; Marion Jones, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Stanley P. Mulka, Ronald G. Piechan, Raphael Przybyla, Walter Tulgetske.

ADDENDA: pages 2, 3, 4, 6, 7, 8, 9, 13, 16, 19, 22 TO CORRECT MATHEMATICAL ERRORS IN ORIGINAL RECOMPUTATION OF AWARDS (November 24, 1971.)

Submitted:
December 23, 1971

OLIVER SCHROEDER, JR.
Oliver Schroeder, Jr., Commissioner
The Law-Medicine Center
Case Western Reserve University
Cleveland, Ohio 44106

ROBERT J. GROGAN
Robert J. Grogan, Commissioner
Leader Building
Cleveland, Ohio 44114

CLAIM OF BARBARA FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR FUHRMAN,

A. Earning capacity loss based on average earnings $5,645 (1961-5) with 1½% annual growth		$22,167
Estimated earnings for 1965-6	$ 5,645	
Estimated earnings for 1966-7	5,729	
Estimated earnings for 1967-8	5,815	
Estimated earnings for 1968-9	5,902	
Recapitulation: Earnings	23,091	
add: Fringe benefits 20%	4,618	
	$27,709	
Deduct 20% from earnings for decedent's personal consumption	5,542	
	$22,167	
B. Decedent's counsel and guidance to minor children		12,000
James Arthur $1,500 annually for 4 years = $6,000		
June Ann $1,500 annually for 4 years = $6,000		
The most important years are the pre-school years for child guidance.		
C. Conscious pain and suffering of Mr. Fuhrman for a definite period of minutes while the *Cedarville* capsized and sank		5,000
Total prejudgment damages		$39,167

II. *Future losses from May 7, 1969*

A. Earning capacity loss $132,922

Mr. Fuhrman has 32 years of work-life expectancy remaining. We use the annual earning capacity as $5902 for these 32 years. We adjust for personal productivity and general economic growth by an increase factor of 2% based on his prior work habits and the general economic growth of the United States. For the first 15 years of these 32 years the family unit has four members. The decedent's personal consumption we determine as 30% because of his household activities and life in the off-shipping season. For the next two years the family has three members. Decedent's personal consumption is here determined as 40% for this period. For the final 15 years just two members remain as the two children reach majority. His personal consumption is set at 50%.

15 years x $5,902	88,530
Deduct 30% decedent's Personal consumption	26,559
	61,971
2 years x $5902	11,804
Deduct 40% decedent's personal consumption	4,722
	7,082
15 years x $5,902	88,530
Deduct 50% decedent's personal consumption	44,265
	44,265

Fringe benefits at 15% of 113,318 = 16,998	113,318 16,998	
	130,316	
Personal productivity improvement and general economic growth at 2% of $130,316	2,606	
	$132,922	
B. Decedent's counsel and guidance to minor children		19,200
James Arthur 15 years x $600	9,000	
June Ann 17 years x $600	10,200	
Total future damages		152,122
Total future damages		
Future damages of $152,122 at 4% compounded annually equals $98,634		
Total award due Fuhrman, Administratrix =	$39,169	Prejudgment
	98,634	Future
	$137,801	Total

II. *Future losses from May 7, 1969*

A. Earning capacity loss 161,334

Mr. Haske has 25 years of work-life expectancy remaining. We use the annual earning capacity of $8,438 for these years. We adjust for personal productivity and general economic growth by an increase factor of 2% based on his prior work habits and the general economic growth of the United States. Personal consumption of decedent is determined to be as follows:

For 3 years two parents and 5 children (1969-72)	25,314
Less 10% decedent's personal consumption	2,531
	22,783
For next 2 years two Parents and 4 children (1972-74)	16,876
Less 15% decendent's personal consumption	2,531
	14,345
For next year two parents and 3 children (1974-75)	8,438
Less 22% decedent's personal consumption	1,856
	6,582
For next 6 years two parents and two children (1975-81)	50,628
Less 28% decedent's personal consumption	14,176
	36,452
For next 3 years two parents and 1 child (1981-84)	25,314
Less 40% decedent's personal consumption	10,126
	15,188

	For last 10 years only the spouses remain (1984-94)	84,380	
	Less 50% decedent's personal consumption	42,190	
		42,190	
			137,540
	Fringe benefits at 15% of equals $20,631	$137,540 20,631	
		158,171	
	Personal productivity improvement and general economic growth at 2% of $158,171		3,163
	Loss of future earning capacity		$161,344
B.	Decedent's counsel and guidance to minor children		24,600
	Gregory Stanley 3 years x $600	1,800	
	Kenneth Raymond 5 years x $600	3,000 3,000	
	Alan Mitchell 6 years x $600	$3,600	
	Brian Keith 12 years x $600	7,200	
	Steven Paul 15 years at $600	9,000	
		$24,600	
Total future damages			$185,944
	Future damages of $185,944 discounted at 4% compounded annually equals $122,963		

Total award due Haske, Administratrix =	$59,166	Prejudgment
	122,963	Future
	$182,129	Total

• • •

A permanent intensive mental hurt in this claimant could not be discerned, however, by Dr. Sprague. (S 63).

Dr. Roehm corroborated temporary injury to Holley's back as a result of the accident and possible recurrent low back strains. (R 107-108).

Holley's testimony revealed the use of a brace, continued back pain, specially prescribed diet, poor sleeping habits, nightmares, emotional difficulties at home, reduced social life. (H 31-39).

Based on the above, findings of facts of permanent partial physical disability, temporary partial mental disability and future loss of earning capacity are made with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969*		
A. Pain and suffering	26,000	
1. $20,000 for the May 7 incident		
2. $1,500 per year for 4 years since		
B. Loss of life's pleasures	8,000	
$2,000 per year for 4 years		
Prejudgment damages	34,000	$34,000
II. *Damages from May 7, 1969*		
A. Loss of earning capacity	72,000	
24 years of work life expectancy with $3,000 annual loss		

B. Pain and suffering 34 years of life expectancy at $500 per year	17,000	
C. Loss of life's pleasures 34 years of life expectancy at $200 per year	6,800	
Future Damages	95,800	
Future damages $95,800 discounted at 4% compounded annually equals $58,329		58,329
Award		$92,329

Even more importantly was the disintegration of Przybyla's relationship with his wife which got worse after the sinking of the Cedarville. (S 115).

The testimony of claimant's wife explained the changed family relationship and social life of claimant. (PR 81-87).

Based on the above, findings of facts of permanent partial physical disability, temporary partial mental disability and loss of future earning capacity are made with damages designated as follows:

I. *Damages from May 7, 1965 to May 7, 1969*		
A. Pain and suffering	$20,000	
1. $10,000 for the May 7, 1965 event		
2. $2,500 per year for 4 years—$10,000		
B. Loss of life's pleasures $2,500 per year for 4 years	10,000	
Prejudgment damages		$30,000

II. *Damages from May 7, 1969*

A. Loss of earning capacity 29 years of work-life expectancy with $1,000 annual loss	29,000	
B. Pain and suffering 35 years life expectancy at $500 per year	17,500	
C. Loss of life's pleasures 35 years of life expectancy at $500 per year	17,500	
Future damages	$64,000	
Future damages $64,000 discounted at 4% compounded annually equals $39,327		$39,327
Award		$69,327

* * *

I. *Damages from May 7, 1965 to May 7, 1969*

A. Pain and suffering	$14,000	
1. For the May 7th event—$10,000		
2. For the 4 years since the sinking—$1,000 per year—$4,000		
B. Loss of life's pleasures $1,000 per year for 4 years	4,000	
Prejudgment damages	$18,000	$18,000

II. *Damages from May 7, 1969*

A. Loss of earning capacity 24 years of work-life expectancy at $800 per year	18,400	
B. Pain and suffering 34 years of life expectancy at $300 per year	10,200	
C. Loss of life's pleasures 34 years of life expectancy at $100 per year	3,400	
Future damages	$32,000	
Future damages $32,000 discounted at 4% compounded annually equals $19,065		19,065
Award		$37,065

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APPENDIX J.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Admiralty No. A 65-6

IN THE MATTER OF:
The Petition of United States Steel Corp. as owner of the Steamship Cedarville.

In Admiralty No. A 65-19

IN THE MATTER OF:
The Petition of Den Norske Amerikalinje A/S, Owner of the M/S Topdalsfjord, for Exoneration From or Limitation of Liability.

JUDGMENT.

This action came on for trial before the Court, Honorable James C. Connell, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the claimants recover from the above petitioners the following judgments:

Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased, the sum of $137,801.00;
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, the sum of $182,129.00;
Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased, the sum of $90,738.00;

Billy R. Holley, the sum of $92,329.00;
Raphael Przybyla, the sum of $69,327.00;
Ronald G. Piechan, the sum of $37,065.00;
Jerome F. Kierzek, the sum of $14,000.00;
Michael Idalski, the sum of $32,670.60;
Stanley P. Mulka, the sum of $14,525.00;
Walter Tulgetske, the sum of $92,733.10.

IT IS FURTHER ORDERED that the costs of the case be assessed against the Petitioners.

Dated at Cleveland, Ohio, this 29th day of March, 1972.

DOMINIC J. CIMINO
DOMINIC J. CIMINO
Clerk of Court

APPENDIX K.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 72-1667, 72-1668

IN THE MATTER OF:
The Petition of United States Steel Corporation, as Owner of the Steamship Cedarville, and the Petition of Den Norske Amerikalinje A/S, as Owner of the M/V Topdalsfjord, for Exoneration From or Limitation of Liability.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ET AL.,
Claimants-Appellants,

v.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,
Petitioners-Appellees.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,
Cross-Appellants,

v.

BILLY R. HOLLEY, ET AL.,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed May 1, 1973.

Before: PHILLIP, Chief Judge, and WEICK and PECK, Circuit Judges.

PECK, Circuit Judge. This admiralty case is making its third appearance before this Court. It arose out of a ship collision in the Straits of Mackinac in May 1965 between ships owned by United States Steel and Den Norske.[1] Claimants are the seven seamen who were allegedly injured and the widows and administratrices of the estates of the three seamen who lost their lives when the bulk steamship *Cedarville,* owned by United States Steel, sunk following its collision with the Norweigian ship *Topdalsfjord,* owned by Den Norske. All the decedents and surviving claimants were crewmembers of the *Cedarville.* The parties shall be referred to as claimants or shipowners, or by their proper names.

Both shipowners admitted liability to the seamen involved, leaving open the question of punitive damages against United States Steel and compensatory damages against both shipowners. The issues as to damages were then split. The District Court awarded punitive damages but we reversed on appeal. *United States Steel v. Fuhrman,* 407 F. 2d 1143 (6th Cir. 1969). To resolve the issue of compensatory damages, the District Court appointed two Commissioners to receive evidence and make findings. Five of the wrongful death claims and seven of the personal injury claims were the subject of the District Court proceedings. The District Court confirmed the Commissioners' report and entered judgments in favor of all the claimants in the amounts determined by the Commissioners. On appeal, it was concluded, inter alia, that principles of maritime law governed and loss of consortium and loss of companionship to children were therefore not compensable. Certain psychiatric testimony was found to have been incompetent and the causes were remanded for a reevalua-

1. The facts are detailed in *Petition of Den Norske Amerikalinje A/S,* 276 F. Supp. 163 (N. D. Ohio, 1967).

tion and further findings on the basis of the record and the principles enunciated in that opinion. *United States Steel Corporation v. Lamp,* 436 F. 2d 1256 (6th Cir. 1970). On remand, the District Court ordered that no further evidence be adduced, but allowed the proffer of the evidence into the record. A recomputation based upon this Court's opinion was prepared and all exceptions and objections thereto were overruled. This action followed and concerns three death claims (two were settled since the previous hearing by this Court) and the seven personal injury claims. The total award for the ten claimants upon this appeal is $763,317.70 as compared to the total award of $1,793,543.00 which was before this Court in the last appeal.[2] Both the shipowners and the claimants have appealed the decision of the District Court. The shipowners concede the propriety of the death awards but appeal the personal injury awards. The claimants appeal all the awards as being inadequate.

Since the District's implementation of our remand instructions is at issue on this appeal, we shall review

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2.	*Original Award*	*Recomputation*
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased	$338,095.00	$137,801.00
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased	308,702.00	182,129.00
Marion Jones, Administratrix of the Estate of Eugene Jones, deceased	149,414.00	90,738.00
Jerome Kierzek	88,860.00	14,000.00
Stanley Mulka	92,740.00	14,525.00
Raphael Przybyla	196,288.00	69,327.00
Ronald Piechan	82,160.00	37,065.00
Billy Holley	251,976.00	92,329.00
Michael Idalski	89,420.00	32,670.60
Walter Tulgetske	195,888.00	92,733.10

at the outset some applicable principles. It is clear that when a case has been remanded, the trial court must upon the remand proceed in accordance with the mandate and law of the case as established by the appellate court. *Ex parte Sibbald v. United States*, 12 Pet. (37 U. S.) 488 (1838); 1B Moore's Federal Practice § 0.404[10] (2d ed. 1965). This is known as the "law of the case" doctrine and operates to preclude reconsideration of identical issues.[3] The basis of the doctrine is that:

> ". . . 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members. [sic]' Roberts v. Cooper, 20 How. [61 U. S.] 467, 481; and it would be impossible for an appellate court to perform its duties satisfactorily and efficiently if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal. Great Western Telegraph, 162 U. S. 339, 344." *General American Life Insurance Co. v. Anderson*, 156 F. 2d 615, 618 (6th Cir. 1946).

This doctrine is not, however, recognized as an inexorable command.[4] Directed to a court's good sense so as to relieve a court of rigid adherence to its former decisions,[5] the doctrine includes consideration of the sound public policy that litigation be decided and then put to an end.[6] Accord

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3. See, generally, 1B Moore's Federal Practice §§ 0.404[1], 0.404[10] (2d ed. 1965).

4. *White v. Higgins*, 116 F. 2d 312 (1st Cir. 1940).

5. See, generally, 1B Moore's Federal Practice § 0.404[4] (2d ed. 1965).

6. *United States of America and Interstate Commerce Commission v. United States Smelting, Refining and Mining Co.*, 339 U. S. 186 (1950).

ingly, we must find some cogent reason to show the prior ruling is no longer applicable. *Lumberman's Mutual Casualty Co. v. Wright*, 322 F. 2d 759, 762 (5th Cir. 1963). Such reasons may include substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice. *White v. Murtha*, 377 F. 2d 428, 431-32 (5th Cir. 1968); cf. *Trice v. Commercial Union Assurance Co.*, 397 F. 2d 889, 890 (6th Cir. 1968). Appellants do not allege substantially different evidence nor do they claim our controlling authority has since issued contrary decisions. Thus, we consider as appropriate to our review only whether a clearly erroneous decision which would work a manifest injustice has been made.

I. CLAIMANTS' APPEAL (No. 72-1667)

The thrust of the claimants' appeal is that the District Court reduced the awards to "unconscionably inadequate" amounts. Each of the claimants' three alleged errors will be treated separately.

A. Loss of Earning Capacity

First, claimants complain the District Court confused the loss of future earning capacity with the deprivation of past earnings. They argue that, in fixing the loss of earning capacity, the District Court erroneously averaged the past four years' earnings and made this the basis for determining future earning capacity. They claim the District Court should have used the collective bargaining agreement, which covered the jobs held by the claimants, to ascertain the future earnings by projection. Their view is that past earnings should be considered only when there

are no other factors to depict an economic horizon. We disagree.

We find that the claimants' arguments regarding future earning capacity were impliedly rejected by this Court earlier:

> "The claimant must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of claimant's earnings history, taking into account all available data relevant to wage adjustment." 436 F. 2d at 1270 (re personal injury claims).
>
> "As we have hereinabove indicated in connection with the personal injury claims, however, the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it." 436 F. 2d at 1275 (re death claims).

In recomputing the personal injury and death claims, earnings history was selected as the base for determining lost earnings or earning capacity. This of course would be subject to change if the individuals had employment prospects other than their employment at the time of their death or injury. The record does not contain evidence of such prospects and claimants have not suggested otherwise.

As for the claimants' argument that the collective bargaining agreement should have been relied upon, this Court previously pointed out that ". . . the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived"[7] showed an

7. 436 F. 2d at 1275.

annual wage increase of approximately 1½% per annum. This rate was used by the District Court in their recomputation. Claimants have persistently argued the bargaining agreement reflects a 4-5% increase. This was rejected previously[8] and we must reject it again as unsupported by the agreement.

We can only conclude that the prior opinion clearly sets out the procedure to be followed by the District Court in determining the future earnings loss of both the death and the personal injury claims, and that these awards are not clearly erroneous.

B. Psychiatric Testimony

The claimants contend that the District Court erred in not granting a new trial in order for the claimants to introduce testimony upon the remand. In ordering the remand, this Court instructed the District Court ". . . to make . . . [s]uch further findings and reevaluation . . . *on the basis only of the evidence herein held to have been properly received* and in accordance with the principles herein enunciated." 436 F. 2d at 1272[9] (emphasis supplied).

Claimants argue that the rule of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525 (1968), re-

8. "The only apparent basis for such assumption on the part of the Commissioners was the testimony of expert actuaries and economists which tended generally to show that all wages tend to increase from 5% to 6% annually as the result of increased productivity and inflation. However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived. Those agreements showed that the annual wage increase which the hourly employees would have been entitled to receive in the four years from date of death to the date of judgment approximated 1½% per annuam, not the 4% to 5% per annum increase found by the Commissioners." 436 F. 2d at 1275.

9. See also, 436 F. 2d at 1266, 1267, 1268 and 1270.

quires that they be permitted to introduce new psychiatric evidence on the issue of the claimants' damages in the District Court.

We find no merit to the claimants' argument for several reasons. First, in *Byrd v. Blue Ridge, supra*, the petitioner sued in the District Court to recover for injuries allegedly caused by respondent's negligence. Respondent asserted as an affirmative defense that petitioner was respondent's employee for purposes of the State's Workmen's Compensation Act and that the Act provided the exclusive remedy. After hearing the respondent's evidence on this issue, the trial judge struck the defense. In accordance with this ruling, the judge did not permit the petitioner to offer evidence on this issue. The Court of Appeals reversed as to the availability of the defense and, without a remand to receive evidence of the petitioner on the issue, made its own determination on the record and directed a judgment for the respondent.

The Supreme Court vacated the directed verdict and remanded to the District Court in order that the petitioner could present evidence in his favor on the issue. The stated reason for the remand was that the petitioner's evidence, although irrelevant under the view of the law taken by the District Court, became relevant and necessary under the corrected interpretation of the defense.

In the instant case, instead of excluding testimony later found to be admissible, the District Court *admitted* evidence (the psychiatric testimony) which was later found inadmissible by this Court. Thus, it is clearly distinguishable from the situation where a decision was rendered without the aid of relevant and necessary evidence, as occurred in *Byrd*. Here, a decision was rendered with the aid of evidence which should not have been before the trial court. The *Byrd* decision is simply inapposite.

Yet, despite *Byrd's* inapplicability to the instant case, it might be said that the usual remand where inadmissible evidence has been introduced requires the District Court to retry the case. However, that principle does not apply here.

This Court previously excluded the testimony of the claimants' psychiatrist on the basis that he was consulted solely to gain qualification as a witness for the claimants; he was not consulted for the purposes of care or treatment.[10] 436 F. 2d at 1263, citing *Padgett v. Southern Railway Co.*, 396 F. 2d 303, 308 (6th Cir. 1968).

Of course, the testimony of this psychiatrist could not subsequently become legitimatized by a change of his function to "treating psychiatrist" five years after the sinking of the *Cedarville*.[11] Similarly, the testimony of another "treating psychiatrist" consulted at that late date[12] could have been no more than a sham attempt at circumventing the holding that testimony of a non-treating psychiatrist is inadmissible.

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10. In regard to the exclusion, the claimants state, "Although it is not stated in this Court's opinion, it is assumed that the reason lay in the fact that the questions to the psychiatrist were not posed as hypothetical questions in accordance with the practice in the state courts of Ohio." Claimants' brief, p. 16. If this were the case, this Court would indeed have remanded with instructions to retry the case; this time with questions posed in the proper form. However, the basis for the exclusion is clearly elucidated in the opinion, 436 F. 2d at 1262-65.

11. On remand, the District Court followed this Court's instructions with respect to the exclusion of the psychiatric testimony and refused to reopen the case for further proof. We note that the claimants' proffer was virtually the same testimony of the psychiatrist presented in the original trial. On this narrow ground alone, this Court would be justified in rejecting the claimants' argument that they should be able to retry their case.

12. The *Cedarville* sank on May 7, 1965. This Court's opinion in the prior appeal was filed on December 23, 1970. Thus, there would be at least a 5½ year period between the injury and the "treatment."

We conclude that there was no necessity for the reopening of proofs[13] after the prior appeal and, a fortiori, no such necessity exists at this time. Nor do we find the presence of clear error.

C. The Awards

Lastly, the claimants contend "the awards were reduced to sums which deprive [them] of their lawful damages and are unconscionably inadequate." We will discuss their claims regarding the death and personal injury cases separately.

1. Death Claims

Following the remand as ordered by this Court, the Commissioners recomputed the death awards. For example, they eliminated compensation for the loss of consortium and counsel to the widows; they eliminated the compensation for the loss of guidance and counsel to the adult emancipated children; they reduced the earnings bases in determining earning capacity loss for both the future and the four year period from incident to judgment. As a result, the total awards were substantially reduced from the original awards. The shipowners do not challenge the recomputed awards and have set aside the funds for their payment.

Claimants have cited the claim of the Fuhrman estate as being representative of their argument that the recomputed awards should be held invalid for being "unconscionably inadequate." After the original trial, the District Court awarded $338,095 to the Fuhrman estate; on remand,

13. It would seem that claimants had ample opportunity during the four year history of the trial to introduce all admissible testimony.

the figure was reduced to $137,801. Claimants argue the award should be $776,400.39.

The claimants contest almost every calculation made by the Commissioners. Once again they attack the averaging of historical earnings for the period of four years from the incident to the judgment. They attack the date of judgment as being the date the District Court issued its judgment upon the remand and not the date the District Court issued its original judgment. They attack the application of the 1½% annual growth factor and seek a 5% factor. They complain that an award for the value of decedent's services around the house and the widow's loss of counsel and guidance was improperly deleted. Amounts allocated to personal consumption by the decedent are questioned and, allegedly, the District Court has failed to adequately assess and include a long list of economic appendages such as overtime, holiday pay, vacation pay, bonus pay, annual service awards, pension and welfare [14] benefits. Claimants also argue that the earning capacity is the amount of money which a claimant could earn if he worked full time.[15]

Although we may agree with the claimants that the Commissioners' efforts throughout this case were less than thorough and meticulous, we do not agree that all their calculations are susceptible to attack. An analysis of the elements of the figures advanced by the claimants demonstrates their vulnerability.

Regarding the calculation of Fuhrman's earning capacity loss, the Commissioners first used as a base the 1964

14. Welfare benefits include life insurance, sickness and accident insurance, and hospital and physician services.

15. One of the few items claimants accept is the figure approved for the decedents' conscious pain and suffering. We previously stated: "The awards for pain and suffering in the death cases will not be disturbed." 436 F. 2d at 1276.

earnings of $5,889.[16] Shipowner United States Steel objected on the basis that Fuhrman's highest earnings ($7,044) occurred not in the year immediately preceding the incident (1964) but rather in 1963. Apparently the shipowners' point is that the year immediately preceding the incident can be used only if it reflected the highest annual earnings of the four year period. It would appear the District Court acceded because an addenda changes the basis of the earning capacity loss to the 1961-64 average earnings of $5,645.

Our previous opinion required the District Court to use the higher of two earning periods as a base. The periods are: (1) the year immediately preceding the incident, or (2) the average of the four years preceding the incident. 436 F. 2d at 1275. A consideration of the year reflecting the highest annual earnings is simply not germane. Therefore, the original recomputation was improperly amended.[17]

Also, in the recomputation the Commissioners apparently increased by the annual growth factor the estimated earnings for 1968-69 to obtain a base for future earning capacity loss. The objection to this was sustained by the District Court. The addenda made the correction by using, as the base, the estimated 1968-69 earnings with-

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16. The gross earnings of the decedents in the years prior to 1965 were as follows:

	Fuhrman	*Haske*	*Jones*
1961	$4,632	$8,156	$7,999
1962	5,014	8,050	7,412
1963	7,044	8,213	8,650
1964	5,889	7,856	7,428
4-yr. avg.:	5,645	8,069	7,872

17. As it turns out, only Fuhrman had an average earning less than the year immediately preceding the incident. See footnote 16, *supra*.

out any increase. Our previous opinion did not instruct on the point and we cannot say that the method used is clearly erroneous. However, we consider these two adjustments regarding selection of a base for computing earning capacity loss as minor.

Regarding future losses, the claimants would have the Court compute a base rate of pay and fringe benefits as if they had worked on the ships twelve months per year every year. We reject this contention. The indisputable fact shown by the record is that the shipping business is seasonal; many months of the year there is not shipping at all. Thus, it is not appropriate to look at a monthly base rate of pay and fringe benefits and project the rates to a full working year as the claimants argue.[18]

Claimants also include alleged losses that were specifically excluded by this Court in the prior appeal. For example, at page 23 of their brief, the claimants state that even though this Court excluded recovery for loss of Fuhrman's counsel and guidance to his wife, ". . . there *is* evidence in the record showing that the decedent did counsel and guide his wife as to money matters and other matters affecting their home and lives. . . ." The claimants then urge the addition of $3,000 per year for this item. Previously we rejected this argument on the basis that ". . . there was no evidence [that these services] could 'only be supplied by the service of another for compensation,' much less any showing [the service had] pecuniary value." 436 F. 2d at 1277-78. Claimants have not convinced us that the rejection of these and other alleged losses constitute clear error. We again reject the claims.

Finally, the claimants use figures and percentages that they contend are more appropriate than those used by

18. *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (2d Cir. 1961), cited by claimants, does not support their proposed method of calculating earnings.

the Commissioners. It is, however, not the function of this Court to decide the more appropriate figure for the losses. Rather, the function is to determine whether the figures used by the District Court below are clearly erroneous. We do not find that level of error to be present.

2. *Personal Injury*

In the main, claimants' arguments are repetitive. They again complain that earning capacity should not be limited to past earnings, that the psychiatric evidence was improperly deleted, and that the original awards were improperly stricken or reduced upon the remand.

For example, claimants argue that the amounts originally awarded for maintenance and cure were improperly stricken and cite *Vaughan v. Atkinson*, 369 U. S. 527 (1962), as authority.[19] We are satisfied our previous opinion properly resolved this point. See, 436 F. 2d 1270-71. There we found ". . . there is no objective evidence that any of the claimants resumed gainful employment for reasons other than their voluntary determination to do so, nor is there any evidence that any of the claimants made any request for medical attention which was wilfully ignored by United States Steel." 437 F. 2d at 1271. Claimants have presented nothing which has not been previously considered or which would warrant a reopening of our prior judgment.

II. SHIPOWNERS' APPEAL (No. 72-1668)

As stated previously, the shipowners contest only the personal injury awards. The seven individual personal injury awards range in amounts from $14,000 to $92,733, with the aggregate accumulating $352,649.70. Originally,

19. Claimants intimate that the shipowners' failure to voluntarily pay maintenance and cure caused the return to work by some claimants. This is unsupported by the record.

the District Court awarded a total of $997,332, with the individual awards ranging from $82,160 to $251,976. See footnote 2, *supra*. On this appeal, the shipowners contend the recomputed awards remain excessive and are not justified by the record.[20]

A. Pain and Suffering for the Incident

The shipowners first complain that the awards for pain and suffering experienced during the sinking itself violate this Court's mandate in that the amounts awarded three claimants are exactly the same as the original awards. The failure to alter the awards is inexplicable[21] in view of our previous opinion that ". . . we regard the awards for pain and suffering on the occasion of the sinking as excessive." 436 F. 2d at 1266.

B. Pain and Suffering from Incident to Judgment

Next, the shipowners complain that three claimants were improperly awarded damages for pain and suffering

20. The shipowners support their argument in part with the following chart:

Earnings lost	0
Days lost from work for causally related complaints after June 3, 1965	14
Days of hospitalization	1
Surgery for causally related complaints	0
Number of claimants seeking medical treatment after June 1, 1965 (for claimed causally related complaints)	2
Number seeking psychiatric treatment	0
Total of medical and psychiatric expenses	0
Job advancements	5
Job demotions	0

21. Our previous opinion expressly noted the failure of the Commissioners to satisfactorily set forth the basis of their awards. 436 F. 2d at 1261-62. We find, however, that the recomputation for this award and the others provides little more insight into the conclusary determinations as made by the Commissioners. Not only do we fail to find precise support for the present pain and suffering awards but we fail to find any explanation for the divergence from our previous direction.

for the four year period from incident to judgment. With respect to these awards, we previously stated:

> "However, also as in the case of the 'For the May 7th event' awards, the fact remains that although there is some evidence in the record as to the claimants' discomfort for a past period, we conclude the amount of the awards to be excessive. . . ." 436 F. 2d at 1266-67.

As in "A" above, these awards did not change upon the remand. There are no additional findings of fact and indeed the basis for the awards remain as elusive as we noted in our previous decision. The failure to follow the mandate of this Court constitutes a flagrant disregard of its specific directions. We have reviewed our previous opinion, 436 F. 2d at 1265-67, and we find the awards indicated in "A" and "B" above to be clearly erroneous.

C. Future Pain and Suffering

The shipowners also attack the award to two claimants for future pain and suffering. In our previous opinion we stated:

> "The awards for future pain and suffering . . . present a similar picture [to the other claims for pain and suffering]." 436 F. 2d at 1267.
>
> ". . . the awards to Mulka . . . based solely on the incompetent psychiatric testimony, must fail completely." 436 F. 2d at 1267.
>
> "The awards to the other five claimants must fail in part also since it is clear that they were based in part on the incompetent psychiatric testimony." 436 F. 2d at 1267.

On the remand the District Court awarded Mulka $525 and reinstated the original award of $17,500 to Przybyla. Again, this disregard of our specific directions violates our mandate. We find these awards to be clearly erroneous.

D. Loss of Life's Pleasures

Two claimants were awarded amounts for the loss of life's pleasures. Despite this Court's statement that ". . . the awards for loss of life's pleasures are so grossly excessive as to be clearly erroneous," 436 F. 2d at 1268, three of the awards were exactly the same on recomputation. As stated previously, satisfactory findings of fact are absent. We find the awards clearly erroneous.

E. Loss of Earning Capacity

In addition, four claimants were awarded amounts for their loss of earning capacity. At the outset, we note that our previous opinion set forth specific guidelines for computing such loss. We stated that the first step is to establish the claimants' "normal annual earning capacity." Next, we stated that ". . . the claimant must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity." 436 F. 2d at 1270. Again we find there are no findings by the Commissioners and further we find a lack of support in the Commissioners' report for findings. In fact, the record provides evidence that the parties increased their earnings in the years following the incident. There is no evidence to support the contention that earnings would have increased to an even higher level but for the injuries. Yet there were awards of $72,000; $36,000; $29,000; and $18,400.

We vacate the awards for the reason that they are unsupported by the evidence in the record. Nowhere do we

find evidence that any of these four claimants has had his earning capacity reduced as a proximate result of an injury arising out of the collision. The Commissioners' report, as adopted by the District Court, does not provide any basis for the awards, nor can we. We find the awards to be clearly erroneous.

III. MODIFICATION OF THE AWARDS

Our prior opinion required the District Court, upon the remand, to reevaluate and recompute the awards " . . . in accordance with the principles herein enunciated." 436 F. 2d at 1272 and 1280. As indicated above, the District Court has failed in several instances to follow those specific instructions. To specifically instruct the District Court for the second time would seem to be of little value and, accordingly we proceed to modify the awards entered on the remand.

There is no question of this Court's inherent ability to modify a district court judgment and enter a final order thereon. As provided in part by 28 U. S. C. § 2106:

> "The Supreme Court or any other court of appellate jurisdiction may . . . modify . . . any judgment, decree or order of a court lawfully brought before it for review. . . ."

However, a question arises relative to the appropriate scope or standard for the modification of the District Court's findings with respect to damages; i.e., whether this Court can independently determine the appropriate amount of damages or whether it is constrained under the "clearly erroneous" standard for review.

McAllister v. United States, 348 U. S. 19 (1954), settled that question when it stated that "[n]o greater scope of review is exercised by the appellate tribunals in ad-

miralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." 348 U. S. at 20. Clearly, then, this Court is restricted to the "clearly erroneous" rule.[22]

Therefore, in modifying an award entered by the District Court, this Court cannot merely exercise its independent judgment as to the proper damages, but can only modify[23] to that maximum amount of damages which could have been awarded by the district court without constituting reversible error. See, *Mitchell v. Evelyn C. Brown, Inc.*, 310 F. 2d 420, 426 (1st Cir. 1962); cf., *Traylor v. United States*, 396 F. 2d 837 (6th Cir. 1968).

IV. THE AWARDS

The compensatory damages to be discussed in this section include "loss of earning capacity," "pain and suffering" and "loss of life's pleasures." By their nature, such items are inherently speculative.

The Commissioners assigned a per annum figure to each item of injury and, having made a determination of duration, then multiplied that figure by the individual claimant's life expectancy in the case of those found to be permanently injured and by a determined period of disability as to the others. A lump sum award based on common sense and experience would seem preferable were we the original triers of fact, but particularly since we are

22. Since July 1, 1966, the Federal Rules of Civil Procedure have been expressly applicable to admiralty cases.

23. A partial collection of cases that have modified awards in admiralty and entered a final order thereon is as follows: *Cates v. United States*, 451 F. 2d 411 (5th Cir. 1971); *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.*, 298 F. 2d 918 (2d Cir. 1961); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F. 2d 583 (2d Cir. 1961); *The Texas Co. v. R. O'Brien & Co.*, 242 F. 2d 526 (1st Cir. 1957); *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4 (6th Cir. 1956); *Menefee v. W. R. Chamberlin Co.*, 183 F. 2d 720 (9th Cir. 1950).

modifying only a portion of the awards, we do not choose to change the approach.

We have reviewed most if not all reported cases awarding pain and suffering damages resulting from maritime casualties. Among those cases is *Moore v. McCormack Lines, Inc. v. Richardson*, 295 F. 2d 583 (2d Cir. 1961), where a District Court awarded $300 per hour for pain and suffering to survivors of a sunken ship who were adrift in shark-infested waters for 46-50 hours with no food and water. The Court of Appeals found the $300 rate excessive and reduced the rate to $150 per hour. Additional sums were included for future pain and suffering.

In the *Petition of the United States*, 418 F. 2d 264 (1st Cir. 1969), a seaman was washed overboard into water so cold that his arms and legs became numb and paralyzed. The seaman was in the water for some thirty minutes before he was hauled aboard a boat where he then lost consciousness. The Court found that the seaman sustained a severe chronic neurosis as a result of the accident and awarded $10,000 for past and future pain and suffering.

In Re Sincere Navigation Corp., 329 F. Supp. 652 (D. C. La. 1971), concerned, in part, two seamen who were in inner compartments of their ships which began to flood and sink almost immediately after collision. Both men escaped and swam to a buoy where they were rescued some 45 minutes later. One man remained in the hospital for 4 or 5 days. His primary suffering was emotional; his physical injuries were relatively insignificant. The other spent 1½ days in the hospital and was treated for minor cuts and a left shoulder injury. Each was awarded $10,000 for physical and mental pain and suffering.

These cases, while obviously in no sense controlling, serve to provide information as to awards which have been made in other jurisdictions on the basis of damages gen-

erally similar to those with which we are here concerned. We turn from them to a consideration of the individual claims before us.

A. Pain and Suffering

MICHAEL J. IDALSKI—Claimant Idalski almost did not get off the ship. As the ship started to capsize to the starboard, Idalski ran to the port lifeboat and tried to get in but the boat was swinging out and, being off balance, he was thrown into the water. He apparently floated on a bumper block for 45 minutes before being pulled up onto a life raft. He found his hands and feet numb. At the hospital he was x-rayed and treated for cuts and abrasions and discharged the same day.[24] Idalski saw a U. S. Public Health doctor three times subsequent to the accident for treatment of his knee and elbow. On June 3, 1965, he resumed sailing aboard a U. S. Steel ship. From the time of his return to work and until the trial, Idalski did not miss a day of work due to an accident related injury nor did he seek medical assistance for any such injury. Claimant's orthopedic expert testified to progressively disabling and pain producing injuries resulting from the accident. The orthopedic expert presenting the shipowners' analysis disputed the findings, although he conceded a shoulder problem and did not dispute claimant's report of pain in the shoulder. During the period from incident to trial, Idalski admitted he saw doctors on at least three occasions for items bearing no relation to the accident and each time failed to mention any effects of the accident.

We find the record indicates with reasonable certainty that Idalski incurred pain and suffering on the day of the

24. Neither Idalski nor any of the other claimants were injured by the impact of the collision.

accident and accordingly we affirm this award of damages to the extent of $8,000. For pain and suffering from the time of incident to date of judgment, we conclude that claimant was reasonably certain to experience pain and suffering from his injuries and accordingly we affirm the award to the extent of $6,000.

In this award, as well as the other awards for pain and suffering and loss of life's pleasures, the Commissioners in their recomputation considered the expert opinion testimony of the shipowners' psychiatrist as evidence of mental disabilities. That testimony was provided in rebuttal to the claimants' expert psychiatric opinion testimony which was previously held inadmissible. 436 F. 2d at 1262-65. Consequently, we view that testimony as irrelevant for the remand proceedings. Further, the reasons that dictated the inadmissibility of claimants' forensic medical expert also require exclusion of the shipowners' similar evidence.

WALTER TULGETSKI—Claimant Tulgetski jumped into a lifeboat, but as the ship began to capsize he jumped from it into the water. By his own estimate, he spent about thirty minutes in the water. Upon rescue, he was taken to the hospital, but he was discharged the same day. He complained of being numb and cold. His chest and arms were later noticeably black and blue. The medical testimony is fairly consistent in supporting the physical claims although the degree of disability is disputed. Examination revealed back limitations in the lumbar spine. Accordingly, we affirm the award to Tulgetski to the extent of $9,000 for pain and suffering incurred on the day of the accident.

BILLY R. HOLLEY—Claimant Holley was a hero of this accident. From the time of the collision until rescue,

he displayed leadership in saving lives and tending to his comrades. Upon rescue, he was seen to be visibly shaking. There is no testimony, even from himself, indicating that he spent any time in the water. At the hospital he was treated for abrasions and dismissed the same day. Black and blue spots on his back and shoulder were noted. Later that day he complained of pain, called a doctor and returned to the hospital where he remained until discharge the next morning. X-rays revealed no broken bones and tests yielded negative results. The medical testimony indicated that Holley suffered a degeneration of the lumbrosacral intervertebral disc. We find that the award to claimant Holley should be affirmed to the extent of $15,000 as damages for his pain and suffering on the date of the accident.

STANLEY P. MULKA—The Commissioners found a temporary partial mental disability for ten years from the date of the incident for claimant Mulka. The recomputation is apparently based on the testimony of the shipowners' psychiatrist who offered that the incident aggravated pre-existing problems. As stated previously, this testimony will not support an award.

RONALD G. PIECHAN—In the case of claimant Piechan, claimant's orthopedic expert diagnosed injuries to his knee joints and right hand. The shipowners' orthopedic expert found a progressive arthritic condition but attributed it to aging. He did not diagnose the alleged right hand or right knee joint injuries. Piechan returned to work on May 24, about two and one-half weeks after the accident. He subsequently complained of pain in the leg and hand areas, sought medical advice on several occasions and received medication. He has not lost any time off from work. We affirm the award to the extent of $3,500 for pain

and suffering incurred during the period from incident to judgment.

RAPHAEL A. PRZYBYLA—As to claimant Przybyla, the Commissioners found a permanent partial physical disability. The medical testimony indicated that this claimant's injuries include back injuries and conceded that the injuries would result in pain. The medical authorities appeared consistent in their diagnosis of the injuries of this claimant, although they did disagree as to the degree of disability. Claimant had not missed any time from work between and judgment for medical reasons and had not sought medical treatment of any kind since the accident. A visit to the U. S. Public Health Service doctor two weeks after the incident was for examination purposes only.

We find it reasonably certain that claimant did incur pain and suffering from his physical disabilities during the period from incident to judgment and we therefore affirm the award to him to the extent of $4,000 as damages. As to future pain and suffering, we likewise find it reasonably certain that such pain and suffering may continue to provide some degree of limitation in the future. We therefore affirm the award of damages to the extent of $8,750 on this account.

B. Loss of Life's Pleasures

As stated in our previous opinion, awards for this item are provided ". . . to claimants, who by reason of their injury are deprived of the opportunity to participate in the normal activities, social, athletic or recreational, in which a person without such injury could engage." 436 F. 2d at 1267. With this in mind, we shall consider the individual claims before us.

RONALD G. PIECHAN—Testimony has indicated that claimant Piechan suffered injury to his knees and his right hand. We find evidence in the record to support the finding that there was an impact on the normal activities in which claimant may have otherwise had opportunity to participate. We affirm the award to the extent of $3,600 for the period from incident to judgment.

RAPHAEL A. PRZYBYLA—Claimant Przybyla was awarded $10,000 for the loss of life's pleasures for the period from incident to judgment and $17,500 for future loss. We conclude that the medical testimony as referenced in our discussion of the pain and suffering awards would support a finding that claimant would experience some reduced ability to participate in normal social, athletic or recreational activities. Accordingly, we affirm the award of damages in the amount of $5,000 for the period from the incident to judgment and of $8,750 for the future loss of life's pleasures.

C. Earning Capacity

As to the awards for the loss of earning capacity, we find that none of the vacated awards regarding personal injury claims may be reinstated in any amount (See Section II, Shipowners' Appeal, part E., p. 16-17). As stated therein, there is simply no basis for awards to these four claimants (Przybyla, Piechan, Holley and Tulgetske), as there is no evidence supporting a reduced earning capacity proximately related to their experience in the collision.

RAPHAEL A. PRZYBYLA—Claimant Przybyla had been sailing for only six months at the time of the accident. For the preceding 18 years, excluding a two-year tour of duty with the U. S. Army, he worked for his father. After the sinking, he returned to his father's business at

his father's request and with an increase in salary. On January 1, 1968, claimant's father entered semi-retirement and left actual control of the business to claimant.

RONALD G. PIECHAN—Claimant Piechan has continued to work for U. S. Steel since the accident. He had maintained the same position that he held for 12 years prior to the sinking. This is far as he can go in his profession as long as he remains unlicensed.

BILLY R. HOLLEY—Claimant Holley has continued to work for U. S. Steel as a Stokerman, a position he held for the ten years prior to the accident. From August 1965 through 1967 (when this suit was originally filed), he had only one absence due to illness (a pre-existing hemorrhoid condition). He was elected a member of the union negotiating team by his shipmates and has served as the ship's delegate since the accident.

WALTER TULGETSKE—Claimant Tulgetske has been sailing with U. S. Steel since the accident. In 1966, he was promoted to Chief Engineer with appropriate increase in earnings.

We have previously discussed certain corrections to the death awards for the loss of future earning capacity. The corrections refer to the calculation of an earning capacity base (See Section I, CLAIMANT'S APPEAL, Part C, pp. 11-12). Applying those corrections, we modify the District Court's award to Claimant Barbara Fuhrman so as to read "$139,276." See pp. 27-28.

V. REDUCTION OF FUTURE DAMAGES TO PRESENT VALUE

The Commissioners discounted the awards of future damages at 4% compounded annually. Our application of their factors provides a significant variance from their

reported results, and their meager explanation of the calculations gives us no clue as to the resolution of variance. We are simply unable to reconcile their calculations. We have therefore recalculated the present worth of each future damage award. Our present worth factor source is the *Financial Compound Interest and Annuity Tables*, Financial Publishing Co., Boston, 1st ed., 1947. As the most appropriate, we have chosen the table located therein at page 639 and entitled "Present Worth of 1 Per Period." The rate is 4%, compounded annually. This table has been chosen since it is based on annual (or periodic) payments which is consistent with the per annum approach used by the Commissioners in determining damages. Our approach has been (1) to calculate the actual annual awards to each claimant and (2) to apply the present worth factor as selected from the table referenced above.

Regarding the factors selected from the table, it should be understood that the factor for any given period reflects the value as though a payment were made at the end of that period. Since the theory here is that a payment would be made at the beginning of the period, we have followed the standard actuarial practice of taking the factor for the prior period and adding the whole number 1 to the factor. For example, in looking at the claimant Fuhrman's award for a period of 32 years, we note that the factor would be 17.873551 (rounded to six places) for period 32. However, we have adopted the factor for 31, which is 17.588494, and added the whole number 1 to get a factor of 18.588494. This method, of course, benefits the claimant in that the year in which the award is received is not included in the discounting.

BARBARA J. FUHRMAN

A. Earning Capacity Loss—Mr. Fuhrman had a remaining work-life expectancy of 32 years. An annual earn-

ing capacity[25] of $6,158 is used and a 2% factor for personal productivity and general economic growth is applied. For the first 15 years, the family unit has four members and decedent's personal consumption during this period is calculated at 30%. For the next two years the family has three members and a personal consumption rate of 40% is applicable. For the final 15 years just two members remain as the two children reach majority. The personal consumption rate is set at 50%.

1. 15 years x $6,158	$92,370
Deduct 30% personal consumption	27,711
	64,659
Add 15%, fringe benefits	9,699
	74,358
Add 2%, growth	1,487
Total amount, 15 years	75,845
Average annual amount for the period	5,056
2. 2 years x $6,158	12,316
Deduct 40%, personal consumption	4,926
	7,390
Add 15%, fringe benefits	1,108
	8,498

25. In calculating the annual earning capacity for the three death claimants, the Commissioners have applied the 1½% annual growth rate for each of the years 1965-1969 to the 1964 gross earnings of each decedent (see footnote 16, *supra*). The year 1969 marks the date of the original judgment and thus is the bench-mark for calculating future earnings.

Add 2%, growth	170
Total amount, 2 years	8,668
Average annual amount for the period	4,334

3. 15 years x $6,158	92,370
Deduct 50%, personal consumption	46,185
	46,185
Add 15%, fringe benefits	6,928
	53,113
Add 2%, growth	1,062
Total amount, 15 years	54,175
Average annual amount for the period	3,611

4. Expressing the average amounts cumulatively:

   $3,611 for each of the 32 years
   $ 723 for each of the first 17 years
   $ 722 for each of the first 15 years

5. Applying the present worth factors:

a. $3,611 for each of 32 years	=	$ 115,552
Present worth factor for 32	=	18.588494
(18.588494) ($3,611)	=	$ 67,123
b. $723 for each of 17 years	=	$ 12,291
Present worth factor for 17	=	12.652296
(12.652296) ($723)	=	$ 9,148
c. $722 for each of 15 years	=	$ 10,830
Present worth factor 15	=	11.563123
(11.563123) ($722)	=	$ 8,349

d. Total future damages:

$115,522 + $12,291 + $10,830	=	$ 138,673
Present worth of $138,673 =		
$67,123 + $9,148 +$8,349	=	$ 84,620

B. Decedent's Counsel and Guidance to Minor Children:

1. James Arthur

$600 for each of 15 years	=	$ 9,000
Present worth factor for 15	=	11.563123
(11.563123) ($600)	=	$ 6,938

2. June Ann

$600 for each of 17 years	=	$ 10,200
Present worth factor for 17	=	12.652296
(12.652296) ($600)	=	$ 7,591

3. Total future damages:

$9,000 + $10,200	=	$ 19,200
Present worth of $19,200 =		
$6,938 + $7,591	=	$ 14,529

C. Grand Total Future Damages:

$138,673 + $19,200	=	$ 157,873
Present worth of $157,873 =		
$84,620 + $14,529	=	$ 99,149

ELIZABETH HASKE

A. Earning Capacity Loss—Mr. Haske had a remaining work-life expectancy of 25 years. We have used an annual earning capacity of $8,438 and have adjusted for

personal productivity and general economic growth by using a 2% factor. For the first 3 years there are five children and a 10% personal consumption rate for decedent is used; for the next two years, there are four children and a 15% consumption rate is used; the next year, three children and a 22% rate; the next 6 years, there are two children and a 28% rate; the next 3 years, one child and a 40% rate; the last 10 years, no children and a 50% rate is applied.

1. 3 years x $8,438	$25,314
Deduct 10%, personal consumption	2,531
	22,783
Add 15%, fringe benefits	3,417
	26,200
Add 2%, growth	524
Total amount, 3 years	26,724
Average annual amount for the period	8,908
2. 2 years x $8,438	16,876
Deduct 15%, personal consumption	2,531
	14,345
Add 15%, fringe benefits	2,152
	16,497
Add 2%, growth	330
Total amount, 2 years	16,827
Average annual amount for the period	8,414

3. 1 year x $8,438	8,438
Deduct 22%, personal consumption	1,856
	6,582
Add 15%, fringe benefits	987
	7,569
Add 2%, growth	151
Total amount, 1 year	7,720
Average annual amount for the period	7,720
4. 6 years x $8,438	50,628
Deduct 28%, personal consumption	14,176
	36,452
Add 15%, fringe benefits	5,468
	41,920
Add 2%, growth	838
Total amount, 6 years	42,758
Average annual amount for the period	7,126
5. 3 years x $8,438	25,314
Deduct 40%, personal consumption	10,126
	15,188
Add 15%, fringe benefits	2,278
	17,466
Add 2%, growth	349
Total amount, 3 years	17,815
Average annual amount for the period	5,938

6. 10 years x $8,438	$84,380
Deduct 50%, personal consumption	42,190
	42,190
Add 15%, fringe benefits	6,328
	48,518
Add 2%, growth	970
Total amount, 10 years	49,488
Average annual amount for the period	4,949

7. Expressing the average amounts cumulatively:

   $4,949 for each of the 25 years
   $ 989 for each of the first 15 years
   $1,188 for each of the first 12 years
   $ 594 for each of the first 6 years
   $ 694 for each of the first 5 years
   $ 494 for each of the first 3 years

8. Applying the present worth factors:

a. $4,949 for each of 25 years	=	$123,725
Present worth factor for 25	=	16.246963
(16.246963)($4,949)	=	$ 80,406
b. $989 for each of 15 years	=	$ 14,835
Present worth factor for 15	=	11.563123
(11.563123)($989)	=	$ 11,436
c. $1,188 for each of 12 years	=	$ 14,256
Present worth factor for 12	=	9.760477
(9.760477)($1,188)	=	$ 11,595
d. $594 for each of 6 years	=	$ 3,564
Present worth factor for 6	=	5.451822
(5.451822)($594)	=	$ 3,238

e. $694 for each of 5 years = $ 3,470
Present worth factor for 5 = 4.629895
(4.629895)($694) = $ 3,213

f. $494 for each of 3 years = $ 1,482
Present worth factor for 3 = 2.886095
(2.886095)($494) = $ 1,426

g. Total future damages:
$123,725 + $14,835 + $14,256 + $3,564 + $3,470 + $1,482 = $161,332
Present worth of $161,332 = $80,406 + $11,436 + $11,595 + $3,238 + $3,213 + $1,426 = 111,314

B. Decedent's Counsel and Guidance to Minor Children:

1. Gregory Stanley
$600 for each of 3 years = $1,800
Present worth factor for 3 = 2.886095
(2.886095)($600) = $1,732

2. Kenneth Raymond
$600 for each of 5 years = $ 3,000
Present worth factor for 5 = 4.629895
(4.629895)($600) = $ 2,778

3. Alan Mitchell
$600 for each of 6 years = $ 3,600
Present worth factor for 6 = 5.451822
(5.451822)($600) = $ 3,271

4. Brian Keith
$600 for each of 12 years = $ 7,200
Present worth factor for 12 = 9.760477
(9.760477)($600) = $ 5,856

5. Steven Paul

$600 for each of 15 years	=	$ 9,000
Present worth factor for 15	=	11.563123
(11.563123) ($600)	=	$ 6,938

6. Total future damages:

$1,800 + $3,000 + $3,600 + $7,200 + $9,000	=	$24,600
Present worth of $24,600 = $1,732 + $2,778 + $3,271 + $5,856 + $6,938	=	$20,575

C. Grand Total Future Damages:

$161,332 + $24,600	=	$185,932
Present worth of $185,932 = $111,314 + $20,575	=	$131,889

* * *

BILLY R. HOLLEY (34 year life expectancy)

A. Future Pain and Suffering:

$500 for each of 34 years	=	$ 17,000
Present worth factor for 34	=	19.147646
(19.147646) ($500)	=	$ 9,574

B. Loss of Life's Pleasures:

$200 for each of 34 years	=	$ 6,800
Present worth factor for 34	=	19.147646
(19.147646) ($200)	=	$ 3,830

C. Grand Total Future Damages:

$17,000 + $6,800	=	$ 23,800
Present worth of $23,800 =		
$9,574 + $3,830	=	$ 13,404

RAPHAEL PRZYBYLA (35 year life expectancy)

A. Future Pain and Suffering:

$250 for each of 35 years	=	$ 8,750
Present worth factor for 35	=	19.411198
(19.411198) ($250)	=	$ 4,853

B. Loss of Life's Pleasures:

$250 for each of 35 years	=	$ 8,750
Present worth factor for 35	=	19.411198
(19.411198) ($250)	=	$ 4,853

C. Grand Total Future Damages:

$8,750 + $8,750	=	$ 17,500
Present worth of $17,500 =		
$4,853 + $4,853	=	$ 9,706

RONALD G. PIECHAN (34 year life expectancy)

A. Future Pain and Suffering:

$300 for each of 34 years	=	$ 10,200
Present worth factor for 34	=	19.147646
(19.147646) ($300)	=	$ 5,744

B. Loss of Life's Pleasures:

$100 for each of 34 years	=	$ 3,400
Present worth factor for 34	=	19.147646
(19.147646) ($100)	=	$ 1,915

C. Grand Total Future Damages:

$10,200 + $3,400	=	$ 13,600
Present worth of $13,600 =		
$5,744 + $1,915	=	$ 7,659

MICHAEL IDALSKI (19.2 year life expectancy)

A. Future Pain and Suffering:

$500 for each of 19.2 years	=	$ 9,600
Present worth factor for 19.2	=	13.754225
(13.754225) ($500)	=	$ 6,877
$500 for each of 10 years	=	$ 5,000
Present worth factor for 10	=	8.435332
(8.435332) ($500)	=	$ 4,218

B. Grand Total Future Damages:

$9,600 +$5,000	=	$ 14,600
Present worth of $14,000 =		
$6,877 + $4,218	=	$ 11,095

WALTER TULGETSKI

A. Future Pain and Suffering:

$500 for each of 25.2 years	=	$ 12,600
Present worth factor for 25.2	=	16.321986
(16.321986) ($500)	=	$ 8,161
$500 for each of 15 years	=	$ 7,500
Present worth factor for 15	=	11.563123
(11.563123) ($500)	=	$ 5,782

$500 for each of 10 years	=	$ 5,000
Present worth factor for 10	=	8.435332
(8.435332) ($500)	=	$ 4,218
Total Future Damages:		
$12,600 + $7,500 + $5,000	=	$ 25,100
Present worth of $25,100 =		
$8,161 + $5,782 + $4,218	=	$ 18,161

B. Loss of Life's Pleasures:

$500 for each of 15 years	=	$ 7,500
Present worth factor for 15	=	11.563123
(11.563123) ($500)	=	$ 5,782
$500 for each of 10 years	=	$ 5,000
Present worth factor for 10	=	8.435332
(8.435332) ($500)	=	$ 4,218
$500 for each of 5 years	=	$ 2,500
Present worth factor for 5	=	4.629895
(4.629895) ($500)	=	$ 2,315
Total Future Damages:		
$7,500 + $5,000 + $2,500	=	$ 15,000
Present worth of $15,000 =		
$5,782 + $4,218 + $2,315	=	$ 12,315

C. Grand Total Future Damages:

$25,100 + $15,000	=	$ 40,100
Present worth of $40,100 =		
$18,161 + $12,315	=	$ 30,476

VI CONCLUSION

The awards of the District Court are modified as set forth in this opinion and are summarized as follows:

	Damages		
	Future	*Other*	*Total*
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, Deceased	$ 99,149	$40,127	$139,276
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, Deceased	131,889	59,166	191,055
Marion Jones, Administratrix of the Estate of Eugene Jones, Deceased	49,410	46,710	96,120
Jerome Kierzek	——	14,000	14,000
Stanley Mulka	——	14,000	14,000
Raphael Przybyla	9,706	19,000	28,706
Ronald Piechan	7,659	17,000	24,659
Billy Holley	13,404	29,000	42,404
Michael Idalski	11,095	14,000	25,095
Walter Tulgetske	30,476	37,000	67,476

Interest shall attach to the awards as of the date of the original District Court judgment, May 7, 1969. See *Swartzbaugh Manufacturing Co. v. United States*, 289 F. 2d 81, 85 (6th Cir. 1961).

APPENDIX L.

FILED
May 1, 1973
JAMES A. HIGGINS, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 72-1667.

THE PETITION OF UNITED STATES STEEL CORP., ET AL.,
Plaintiffs-Appellees,

v.

BARBARA J. FUHRMAN, ADM. OF THE ESTATE OF ARTHUR FUHRMAN, ET AL.,
Defendants-Appellants.

Before: PHILLIPS, *Chief Judge*, WEICK and PECK, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby modified and affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendants-Appellants, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

JAMES A. HIGGINS
Clerk

A True Copy.

Attest:

James A. Higgins, Clerk

Issued as Mandate:

COSTS:

Filing fee .....$

Printing $

Total $

FILED
May 1, 1973
JAMES A. HIGGINS, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 72-1668.

THE PETITION OF UNITED STATES STEEL CORP., ET AL.,
Plaintiffs-Cross-Appellants,
v.

BILLY R. HOLLEY, ET AL.,
Defendants-Cross-Appellees.

Before: PHILLIPS, *Chief Judge,* WEICK and PECK, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and awards modified as set forth in the opinion.

It is further ordered that Plaintiffs-Cross-Appellants recover from Defendants-Cross-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

JAMES A. HIGGINS
Clerk

A True Copy.

Attest:

James A. Higgins, Clerk

Issued as Mandate:
COSTS:
Filing fee .....$
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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973
No. 73-194

BARBARA L. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,

and

DEN NORSKE AMERIKALINJE A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

October Term, 1973
No. 73-194

BARBARA L. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION,

and

DEN NORSKE AMERIKALINJE A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

COUNTER QUESTIONS PRESENTED

I. Where, as here, the Court of Appeals ruled that the psychiatrist's testimony, in the absence of a proper foundation, was inadmissible because he had been "consulted solely to gain qualification as a witness for the claimants," and where the claimants had ample opportunity to introduce competent evidence but elected not to do so, was that Court justified in declining to remand for a new trial and in entering judgment based upon all of the admissible proof?

II. Did the Court of Appeals properly determine the loss of future earning capacity in the death claims by considering the collective bargaining agreements and fringe benefits pertinent to the decedents rather than an unsubstantiated "analysis" by Petitioners already twice rejected by the District Court and the Court of Appeals?

COUNTER STATEMENT OF THE CASE

The Petitioners, as they did on the two prior occasions when they unsuccessfully attempted to secure a review by this Court, have again ignored the requirement of Rule 23(e) that a Petition for a Writ of Certiorari shall contain "a concise statement of the case containing the facts material to a consideration of the questions presented." As was the situation in connection with the second Petition for a Writ of Certiorari filed by these Claimants, the questions involved herein relate solely to the issue of *compensatory* damages. The alleged "facts" set forth in Claimants' "Statement of the Case" are taken from the decision of the District Court awarding punitive damages. These "facts" were found to be inaccurate by the Court below and it reversed the District Court (407 F.2d 1143, 6 Cir. 1969). This Court denied certiorari. *Fuhrman v. United States Steel Corporation,* 398 U.S. 958 (1970).

In advising this Court (Pet. p. 5) concerning the reversal by the Court of Appeals of the compensatory damage awards approved by the District Court, counsel for the Petitioners have neglected to mention that a Petition for a Writ of Certiorari was filed and that it was denied. The decision of the Court of Appeals is reported at 436 F.2d 1256 and the denial of the writ is reported at 402 U.S. 987 with the Petition for Rehearing denied at 403 U.S. 924.

The facts which are involved in the present petition relate: (1) to the excluded testimony of Dr. Dillon, the Petitioners' psychiatric witness; and (2) to the computation of pecuniary losses. The reasons for the rejection of Dr. Dillon's testimony and the contentions of Petitioners regarding computation of damages appear in the two opinions of the Court below (Appendix F, pp. A99-106, and Appendix K, pp. A195-198). Petitioners' Statement of the Case is fraught with inaccuracies and largely irrelevant.

This litigation arises out of the collision between the Steamship *Cedarville,* a Great Lakes bulk carrier, and Motor Vessel *Topdalsfjord* in the Straits of Mackinac on May 7, 1965, which resulted in the sinking of the *Cedarville* and deaths of ten of her crew members. From November 13, 1967, to November 7, 1968, hearings were held before court appointed commissioners to determine compensatory damages with respect to five death claims and seven personal injury claims. The District Court entered judgment in accordance with the Commissioners' report, awarding excessive damages both in the death cases and in the personal injury cases. On December 23, 1970, the United States Court of Appeals for the Sixth Circuit issued its opinion on these appeals under the title of *United States Steel Corporation and Den Norske Amerikalinje v. Alice Marie Lamp Admx., et al.* reported at 436 F.2d 1256 (1970). The Court held *inter alia,* that certain evidence admitted by the District Court was incompetent, that awards for pain and suffering, loss of life's pleasures, loss of earning capacity and other awards were unsupported by the record and clearly erroneous, and that present value was improperly computed. The Court therefore reversed the District Court's decision and remanded the case for re-evaluation and further findings on the basis of the record and the principles enunciated in the Court of Appeals opinion. No rehearing was requested.

Claimants filed Petitions for Writs of Certiorari with the United States Supreme Court. The Petitions were denied. *Fuhrman v. United States Steel Corp., et al.*, No. 1475, *cert. den.* 91 S. Ct. 1660 (1971) (5-17-71) (402 U.S. 987), *reh. den.* 91 S. Ct. 2227 (1971) (6-14-71) (403 U.S. 924); *Lamp v. United States Steel Corp., et al.*, No. 1370, *cert. den.* 91 S. Ct. 1649 (1971) (5-17-71) (402 U.S. 987), *reh. den.* 91 S. Ct. 2247 (1971) (6-21-71) (403 U.S. 940); *Cook v. United States Steel Corp., et al.*, No. 1497, *cert. den.* 91 S. Ct. 1665 (1971) (5-17-71) (402 U.S. 987).

Thereafter the claims of death claimants Lamp and Cook were settled for amounts computed in accordance with the decision of the Court of Appeals. This left unresolved only three death claims and seven personal injury claims.

On remand, the District Court ordered the Commissioners to recompute the remaining claims. On November 29, 1971, the Commissioners filed their recomputation of awards. However, after the shipowners protested what were later acknowledged to be numerous and obvious errors, the Commissioners filed on December 23, 1971, an Addendum of Correct Mathematical Errors in Original Recomputation of Awards. On March 24, 1972, the District Court accepted the Recomputation of Awards with the mathematical corrections, and on March 29, 1972, entered judgments in all pending cases.

Thereafter, the shipowners deposited with the Court the amount of the judgments for the death claims, which amount, by order of Court, has been invested in interest-bearing securities for the benefit of the three death claimants. The shipowners promptly filed Notice of Appeal in connection with the seven personal injury judgments. In addition, Notice of Appeal was filed by the seven personal injury claimants and the three death claimants.

On appeal, the Court of Appeals found that the personal injury awards were clearly erroneous, failed to comply with the guidelines mandated by that Court's earlier decision, and were unsupported by the record. The District Court was found to have improperly computed damages for pain and suffering, lost earning capacity and loss of life's pleasures, and to have incorrectly discounted future damages awards.

In those connections, the Court of Appeals referred to the following chart:

Earnings lost	0
Days lost from work for causally related complaints after June 3, 1965	14
Days of hospitalization	1
Surgery for causally related complaints	0
Number of claimants seeking medical treatment after June 1, 1965 (for claimed causally related complaints)	2
Number seeking psychiatric treatment	0
Total of medical and psychiatric expenses	0
Job advancements	5
Job demotions	0

(Appendix K, p. A203)

The Court found the District Court's failure to alter certain awards "inexplicable in view of our previous opinion . . ." (Appendix K, p. A203), and that the District Court's "failure to follow the mandate of this Court constitutes a flagrant disregard of its specific directions" (Appendix K, p. A204). The Court also observed that "to specifically instruct the District Court for the second time would seem to be of little value and, accordingly, we proceed to modify the awards entered on remand" (Appendix K, p. A206).

After modifying the awards consistent with its prior opinion, the Court entered judgment thereon. Even under the Court modification, these claimants received substantial awards, the personal injury claimants receiving from $24,659.00 to $67,476.00 and the two death claimants receiving from $139,276.00 to $191,055.00 (Pet. p. 6).

After entry of judgment by the Court of Appeals, one of the three death claimants and two of the personal injury claimants accepted the Court of Appeals decision and are no longer involved in this litigation. The remaining two death claimants and five personal injury claimants have filed the instant Petition for Writ of Certiorari. Since the Court of Appeals' most recent opinion served only to recompute awards in accordance with that Court's previous ruling, due to the District Court's "flagrant disregard of its direction," the present Petition merely restates contentions with reference to the Court of Appeals' 1970 decision, contentions regarding which this Court has previously denied certiorari.

ARGUMENT

I. This third attempt to secure a review by this Court should be denied. Certiorari should not be granted to "review evidence and discuss facts."

With grave constitutional questions and matters of national interest occupying the attention of this Court, certiorari should not be granted in order to give the defeated party another chance to attempt to demonstrate by an analysis of the facts that error has occurred.

In *United States v. Johnson,* 268 U.S. 220, at page 227, Mr. Justice Holmes, speaking for a unanimous Court, said:

> "* * * We do not grant certiorari to review evidence and discuss specific facts. * * *"

This Court's attitude in cases concerned with matters relating to evidence, whether it be its admissibility or sufficiency, is set forth in the concurring opinion of Mr. Justice Stewart in *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959), where he said:

> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here. All this has been elaborated *in extenso* by others, and there is no point in repeating or paraphrasing their words. Suffice it to note that I agree with what they have said. . ."

Petitioners, in an attempt to escape from this Court's clearly stated position on these matters, seek to secure a

review by urging the existence of a conflict between Circuits and a conflict between the decision below and a decision of this Court. That such conflicts do not exist will be demonstrated below. Stripped of such a conflict, there remains the basic question as to whether this Court should concern itself with the admissibility or non-admissibility of the testimony of a medical witness.

II. The matters raised by Petitioners were decided by the Court below in a prior decision and are now governed by that prior decision under the doctrine of law of the case.

Petitioners' argument is divided into two main parts, each of which is governed by the first decision of the Court below in *United States Steel Corporation and Den Norske Amerikalinje A/S v. Lamp, et al.*, 436 F.2d 1256 (1970), with respect to which this Court considered and denied three separate petitions for writ of certiorari and two separate petitions for rehearing.[1]

That decision is the law of this case and governs all subsequent proceedings. *United States of America v. U. S. Smelting Company*, 339 U.S. 186 (1950).

It is significant that nowhere in Petitioners' brief do they contend that the Commissioners and the District Court failed to follow the mandate of the Court below as set forth in its first decision and reaffirmed in its second decision.

---

1. *Fuhrman v. United States Steel Corporation, et al.*, No. 1475, *cert. denied* 91 S. Ct. 1660 (1971) (5-17-71) (402 U.S. 987), *reh. denied* 91 S. Ct. 2227 (1971) (6-14-71) (403 U.S. 924); *Lamp v. United States Steel Corp., et al.*, No. 1370, *cert. denied* 91 S. Ct. 1649 (1971) (5-17-71) (402 U.S. 987), *reh. denied* 91 S. Ct. 2247 (1971) (6-21-71) (403 U.S. 940); *Cook v. United States Steel Corp., et al.*, No. 1497, *cert. denied* 91 S. Ct. 1665 (1971) (5-17-71) (402 U.S. 987).

II. The decision of the Court of Appeals:

(a) Does not conflict with this Court's decision in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 2 L. Ed. 2d 953 (1958), and

(b) Does not conflict with decisions of other Circuits regarding testimonial evidence of a non-treating physician.

(a) *Byrd v. Blue Ridge is inapplicable.*

Before discussing the decisions upon which the Petitioners rely (Pet. pp. 8-10), it should be pointed out that all of them, including the *Byrd* case, were brought to the attention of this Court in their prior petition for a writ of certiorari and that *Byrd* was discussed, in detail, in their petition for a rehearing. The arguments advanced in the present Petition are simply a rehash of those which have already been considered by this Court (Petition for Writ of Certiorari; No. 1475, October Term 1970, pp. 17-21; Petition for Rehearing No. 1475, October Term 1970, p. 21).

The Court below was of the view that it was not required by *Byrd* to remand the case for a new trial to permit the claimants to introduce psychiatric testimony. Upon the remand, it had instructed the District Court "* * * to make * * * [s]uch further findings and re-evaluation * * * *on the basis only of the evidence herein held to have been properly received* and in accordance with the principles herein enumerated." 436 F.2d at 1272 (Appendix K, p. A195) (Emphasis supplied).

The power of the Court of Appeals to so rule is supported by numerous Supreme Court and Court of Appeals decisions (e.g., *United States v. Penn Foundry & Mfg. Co., Inc.*, 337 U.S. 198 (1949); *Clark v. Travelers Indemnity*

Company, 328 F.2d 819 (7th Cir. 1964); *Paul v. Archer-Daniels-Midland Company*, 313 F.2d 612 (8th Cir. 1963); *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967), and by statute. 28 U.S.C. § 2106 (1948) provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, or may remand the case and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

The inapplicability of *Byrd* to the facts of the instant case was explained by Judge Peck, speaking for the court below (Appendix K, pp. A195-196):

> "Claimants argue that the rule of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1968), requires that they be permitted to introduce new psychiatric evidence on the issue of the claimants' damages in the District Court.
>
> "We find no merit to the claimants' argument for several reasons. First, in *Byrd v. Blue Ridge, supra*, the petitioner sued in the District Court to recover for injuries allegedly caused by respondent's negligence. Respondent asserted as an affirmative defense that petitioner was respondent's employee for purposes of the State Workmen's Compensation Act and that the Act provided the exclusive remedy. After hearing the respondent's evidence on this issue, the trial judge struck the defense. In accordance with this ruling, the judge did not permit the petitioner to offer evidence on this issue. The Court of Appeals reversed as to the availability of the defense and, without a remand to receive evidence of the petitioner on the

issue, made its own determination on the record and directed a judgment for the respondent.

"The Supreme Court vacated the directed verdict and remanded to the District Court in order that the petitioner could present evidence in his favor on the issue. *The stated reason for the remand was that the petitioner's evidence although irrelevant under the view of the law taken by the District Court, became relevant and necessary under the corrected interpretation of the defense.*

"In the instant case, instead of excluding the testimony later found to be admissible, the District Court *admitted* evidence (the psychiatric testimony) which was later found inadmissible by this Court. *Thus, it is clearly distinguishable from the situation where a decision was rendered without the aid of relevant and necessary evidence, as occurred in Byrd. Here, a decision was rendered with the aid of evidence which should not have been before the trial court. The Byrd decision is simply inapposite.*" (Emphasis supplied)

Contrary to the circumstances presented in *Byrd,* Petitioners had ample opportunities to present competent evidence, but chose not to do so. Not only did the District Court's erroneous ruling have no bearing on claimants' prerogative to introduce evidence which Petitioners now contend they should be allowed to introduce on remand, but claimants were advised well in advance of the close of proofs in the initial District Court proceeding that the psychiatric testimony on which they relied might well be found, on appeal, to be incompetent and inadmissible. Under these circumstances, the rule of *Byrd v. Blue Ridge Rural Electric, Inc.,* is inapplicable.

(b) *The decision below does not conflict with the decisions of other Circuits.*

Petitioners have attempted to demonstrate that the exclusion of Dr. Dillon's testimony created a conflict between the decision below and case law in other Circuits. Such is not the case. The Court pointed out that his testimony had been excluded because of lack of proper foundation in as much as he was not a "treating psychiatrist" but had been consulted "solely to gain qualification as a witness for the claimants" and that he could not change his function to that of "treating psychiatrist" five years after the happening of the accident. Further, the Court stated that because the Cedarville had sunk on May 5, 1965, and its opinion in the prior appeal was filed on December 23, 1970, if another psychiatrist had been substituted for Dr. Dillon and his testimony had been offered as that of a "treating psychiatrist" it would have "been no more than a sham attempt at circumventing the holding that testimony of a non-treating psychiatrist is inadmissible" (Appendix K, p. A197).

If the Court of Appeals needed an additional reason for declining to order a retrial of the case it was afforded by the Petitioners themselves. The District Court, on remand, followed the instructions of the Court below with respect to the exclusion of the psychiatric testimony and declined to reopen the case for further proof. The claimants' proffer was virtually the same testimony of Dr. Dillon as had been presented at the original trial. The only difference was that in the proffer his answers and opinions were in response to hypothetical questions which were not supported by competent evidence in the record (Appendix K, p. A197).

Petitioners' argument that Dr. Dillon's testimony, in its original form, was admissible is contrary to the general

rule and is not supported by any of the cases cited and quoted from in the instant Petition. The general rule appears in *Grobelny v. W. T. Cowan*, 151 F.2d 810 (2 Cir. 1945) at 812:

> "The general rule is that self-serving statements are not admissible when made to a doctor who is not called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. There is then no incentive to speak truly in order to give the doctor a true basis for diagnosis to enable him to prescribe the proper medical treatment and there may be some inducement to distort facts for the purpose of a trial if one is in the offing."

The distinction between the admissibility of the testimony of the "treating" and the "non-treating" physician is set forth in the dissenting opinion in *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F.2d 322 (7 Cir. 1963). There, Judge Schnackenberg said (p. 327):

> "It is settled law that, upon the trial of a personal injury case when a physician, other than an attending physician, is called to testify for plaintiff, he is not permitted to express an opinion based upon statements made by the plaintiff for the purpose of enabling the physician to testify in his behalf, while an attending physician, when called as a witness for plaintiff, may express a medical opinion based in part on statements made by his patient in connection with treatment, *Cleveland, C.C. & I. R. Co. v. Newell*, 104 Ind. 264, 270, 3 N.E. 836, 839 (1885), a physician who did not treat plaintiff for the injuries involved is limited to giving an answer to hypothetical questions put to him in court."

This rule applies to any medical expert, including an examining psychiatrist.

Petitioners' reference to and their argument concerning *Teti v. Firestone Tire & Rubber Co.*, 392 F.2d 294 (6 Cir. 1968) (Pet. p. 9), is self-defeating. There, the history given to the examining doctor only became admissible because the plaintiff had testified, under oath, concerning the same facts. In the instant case the claimants not only did not so testify but their testimony was contrary to the alleged histories given to their psychiatrist.

In referring to this marked variance, the Court below said (Appendix F, p. A100):

> *"Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not diametrically opposed to the opinions which the psychiatric expert was permitted to place in the record.* These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a 'post-traumatic anxiety neurosis'—resulting from a half hour's immersion in the waters over which they traveled for a livelihood. *These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners.* In many respects these expert opinions failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments." (Emphasis supplied)

Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947) (Pet. p. 9) is likewise distinguishable. That case involved a divorce proceeding in which the testifying psychiatrist had obviously been consulted by both the husband and wife in connection with their marital difficulties. He was a treating physician and could, therefore, base his opinion upon information elicited from his patient.

There is nothing in *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34 (2d Cir. 1965) (Pet. p. 9), that suggests any conflict with the Court of Appeals decision here. The incompetency and inadmissibility of the testimony of claimants' psychiatric expert in these claims arose out of substantial discrepancies, variances and inconsistencies between the bases used by the expert for his opinion and the uncontroverted facts brought out by the claimants' own testimony and the uncontroverted documentary evidence. The *Reid* decision does not involve any such issue.

In *City-Wide Trucking Corp. v. Ford*, 306 F.2d 805 (D.C. Cir. 1962) (Pet. p. 10), one of the medical questions involved was the possibility of permanent residual effects resulting from the injury. The physician testified concerning a series of tests which he had conducted on the plaintiff. His prognosis was based, not upon subjective complaints, but upon "sufficient findings on an objective basis" (p. 810).

In *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F.2d 322 (7 Cir. 1963) (Pet. p. 10), the Court stated the rationale for rejecting the opinions of non-treating physicians, when they are based upon the self-serving, unsupported and unsworn statements of the injured party. In *Spillers*, the plaintiff had already testified to the same matters upon which the doctor had based his opinion so the

doctor's testimony concerning the plaintiff's statements was largely cumulative (p. 326).

Finally, the same situation obtained in *Fuhrman v. Reading Company*, 439 F.2d 10 (3 Cir. 1971) (Pet. p. 10). There, the defendant complained that the medical experts consulted by the plaintiff for purposes of testimony should not have been permitted to express an opinion based upon a history furnished by the plaintiff. In ruling that the opinion was admissible, the Court said (p. 15):

> "* * * Since the plaintiff himself testified to this very same material during the trial and was available for cross-examination, it is difficult to understand the position of the defense. The plaintiff's history to which he testified in court was no longer hearsay and the Trial Judge properly ruled that the medical experts could express an opinion based on this factual data."

At the risk of repetition, we desire to emphasize that in the case at bar the rejected medical opinions were not, in any instance, supported by the sworn testimony of the individual claimants.

IV. The Court of Appeals correctly vacated awards for loss of earning capacity in the personal injury cases because the record contained no evidence that claimants' earning capacity had been reduced, and, in fact, the record demonstrated that claimants increased their earnings in the years following the collision.

Petitioners complain that the Court below eliminated the element of loss of earning capacity (Pet. p. 10). The sound reason for the Court doing so is that, as the record demonstrates, the claimants' ability to earn has not only not

been diminished but, in some instances, has actually been increased. In that connection, the Court stated (Appendix K, pp. A205-206):

> "In addition, four claimants were awarded amounts for their loss of earning capacity. At the outset, we note that our previous opinion set forth specific guidelines for computing such loss. We stated that the first step is to establish the claimants' 'normal annual earning capacity.' Next, we stated that '* * * the claimant must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity' 436 F.2d at 1270. Again we find there are no findings by the Commissioners and further we find a lack of support in the Commissioners' report for findings. *In fact, the record provides evidence that the parties increased their earnings in the years following the incident. There is no evidence to support the contention that earnings would have increased to an even higher level but for the injuries.* Yet there were awards of $72,000; $36,000; $29,000; and $18,400.
>
> "We vacate the awards for the reason that they are unsupported by the evidence in the record. *Nowhere do we find evidence that any of these four claimants has had his earning capacity reduced as a proximate result of an injury arising out of the collision* * * *" (Emphasis supplied)

The arguments advanced in support of and against the issues raised in Point I of Reasons Relied on for Allowance of Writ highlight the reasons why the writ should be denied. The fact that this is a multiple claim proceeding does not give it additional stature and, stripped to its

essentials, it involves nothing more than a discussion of facts and the admissibility of evidence. Since there is no conflict between Circuits which might warrant a review by this Court, it is time, we respectfully urge, for this protracted litigation to be brought to a close.

V. Claimants' purported economic analysis relative to lost earnings in the death cases has no basis in law or fact, and, contrary to the statement of Petitioners, the pecuniary losses in the death cases were computed by using earnings, an annual growth factor and fringe benefits determined pursuant to the relevant collective bargaining agreements.

Contrary to Petitioners' assertions, the Court below, in determining the loss of future earning capacity in the two death claims, did carefully and accurately consider the collective bargaining agreements and fringe benefits.

At one point, Petitioners claim that "In determining the loss of future earning capacity, the Court below completely ignored the collective bargaining agreements under which the men worked, but instead, took the average earnings for the four years prior to the collision." However, the Petitioners then reveal the inaccuracy of this claim by noting that "The Court below stated that a review of the collective bargaining agreements showed an annual increase in the past years of 1½%." (Pet. p. 12, footnote 9).

The Court of Appeals in its first opinion concerning compensatory damages stated:

> "The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived, but earning capacity may also include

the value of those fringe benefits which would inure to the benefit of the decedent's family had he lived." (Appendix F, pp. A121-A122)

The Court went on to point out that "The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits * * *" (Appendix F, p. A122). The Court continued its consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15% to 40%, stating:

"Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the range suggested by the parties' own evaluations." (Appendix F, pp. A125-A126)

As shown in the opinion of the Court, the claimants' percentage of fringe benefits to earning loss in the Fuhrman death claim was 16%, the shipowners' percentage was 11%, and the Commissioners' percentage was 15%. Similarly, in the Haske death claim the claimants' percentage was 22%, the shipowners' percentage was 10% and the Commissioner's percentage was 15% (Appendix F, p. A126, footnote 8). Rather than ignoring the collective bargaining agreements in its consideration of loss of future earnings, the Court below carefully analyzed the collective bargaining agreements, stating:

"However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived." (Appendix F, p. A127)

In its second opinion on compensatory damages the Court below reexamined the principles concerning loss of future earnings, stating:

> "In recomputing the personal injury and death claims, earnings history was selected as the base for determining lost earnings or earning capacity. This of course would be subject to change if the individuals had employment prospects other than their employment at the time of their death or injury. The record does not contain evidence of such prospects and claimants have not suggested otherwise." (Appendix K, p. A194)

Petitioners' purported "analysis" of the collective bargaining agreements and the fringe benefits set forth in their Exhibits 1, 2 and 3 is so patently erroneous as to be rejected by the Commissioners and the District Court when the original awards were made for loss of earning capacity. It was properly rejected twice by the Court below.

Petitioners' argument in reference to Exhibits 1, 2 and 3 might be summarized as follows: Neither the decedents' nor the personal injury claimants' earnings or earning capacity should be computed by reference to actual earned income and, as clearly stated by the Court below in its first opinion (Appendix F, pp. A116-A117), "taking into account all available data relevant to wage adjustment," but rather should be determined by an "analysis" consisting of the unsubstantiated speculation of a non-witness. The Petitioners' argument is devoid of merit.

The first and most basic error in the Petitioners' "analysis" is that there exists no substantial, factual basis for the "analysis" as made. In Exhibit 1 of their Brief, Petitioners include seven possible sources of current income for seamen (wages, overtime, holiday pay, vacation

pay, bonuses, subsistences and annual service awards). To the extent that these sources result in pecuniary benefit to an employee, such benefit will be reflected in his aggregate annual earnings.

The remainder of Petitioners' "analysis" related to pension and welfare benefits. It is impossible to make any detailed response in this connection because the basis, factual and actuarial, upon which the "analysis" is developed is not in the record. However, we need not belabor this issue further because, as found by the Court below, acceptable percentage factors were developed based on the evidence in the record showing the relationship between earnings and fringe benefits and were used by the Commissioners and District Court in computing the present death awards.

Petitioners' "analysis" may be fairly characterized as fantasy. Under the Petitioners' computations, the total of Fuhrman's loss of earnings would be $778,505. Prior to his death, Fuhrman never earned more than $7,044 in any one year. Thus, it would take Fuhrman at least 110 years to earn the amount the Petitioners urge represents Fuhrman's loss of earnings. The foregoing remarks are equally applicable to the Haske death claim.

Petitioners claim, "In addition, the Court below also overlooked the future annual increases." (Pet. p. 13). This is false. The Commissioners, in their recomputation of the earning capacity losses in the death claims, stated:

> "In addition an annual wage increase of 1-1/2% from death date to judgment date is applied. For the period from the judgment date to the final year of the work life expectancy, after review of the evidence, the findings of personal productivity and economic growth

were made in each individual death claim as indicated in the recomputations." (Appendix H, p. A142)

The Court below in its second opinion on compensatory damages agreed with the Commissioners' determinations in this aspect of the death claims, stating:

"We can only conclude that the prior opinion clearly sets out the procedure to be followed by the District Court in determining the future earnings loss of both the death and the personal injury claims, and that these awards are not clearly erroneous." (Appendix K, p. A195)

Contrary to Petitioners' assertions that the testimony of their witness on the rate of wage increases was "uncontradicted" and unchallenged by United States Steel Corporation, this testimony was so thoroughly refuted that the Court below, in referring to the Petitioners' position on the rate of annual wage increase, stated in its second opinion:

"Claimants have persistently argued the bargaining agreement reflects a 4-5% increase. This was rejected previously and we must reject it again as unsupported by the agreement." (Appendix K, p. A195)

The Court below carefully considered all relevant factors in determining the loss of future earning capacity in the death claims as well as in the personal injury claims and gave full measure to the collective bargaining agreements and the fringe benefit factors. It, in fact, increased the awards in the two death claims over those recomputed by the Commissioners and the District Court as conceded by the Petitioners (Pet. p. 6).

These precise issues have already been before this Court in connection with claimants' earlier Petition for

Writ of Certiorari and Petition for Rehearing, both of which were denied. (Petition for Writ of Certiorari, No. 1475, October Term 1970, pp. 22-28; Petition for Rehearing, No. 1475, October Term 1970, p. 5). Petitioners' contentions thus represent no more than a stale rehash of arguments which have previously been considered by this Court.

CONCLUSION

The arguments advanced by the Petitioners have been twice rejected by the Court below in well considered opinions and highlight the reasons why the writ should be denied. There is nothing inconsistent in the opinion of the Court below with any of the decisions cited by the Petitioners. Petitioners' difficulty in the Court below resulted not from that Court adopting rules contrary to or in conflict with those of the other Circuits, but from the fact that it scrupulously observed the rules and principles in concordance with those of other Circuits. Petitioners' difficulties with well established rules of evidence result from a complete absence of any credible evidence in the record to support any of the Petitioners' assertions and these difficulties do not involve constitutional problems or problems of great national interest.

Stripped to its essential elements, this case involves nothing more than a discussion of the balancing of facts and the admissibility of evidence. There is no conflict herein between Circuits nor with decisions of this Court.

We respectfully urge that the Petition be denied and that this endless litigation be terminated.

Respectfully submitted,

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